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No.

In the
Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

vs.

RAY E. SHAIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LORNA B. GOODMAN
County Attorney
County of Nassau
Attorney for Petitioners
One West Street
Mineola, New York 11501
(516) 571-3015

LORNA B. GOODMAN*
DAVID B. GOLDIN
PETER J. CLINES
of Counsel.

* *Counsel of Record*

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QUESTION PRESENTED FOR REVIEW

The Nassau County Correctional Center ("NCCC") instituted a policy to strip search all inmates admitted to the facility, to prevent smuggling of weapons, drugs and other contraband. Respondent brought a lawsuit challenging the policy, after he was arrested for misdemeanor harassment and strip-searched upon admission to the Correctional Center. Applying the Second Circuit's "reasonable suspicion" standard first articulated in *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), the Court of Appeals declared the policy unconstitutional. In conflict with the Fourth, Seventh and Ninth Circuits, and over the vigorous dissent of Circuit Judge Cabranes, the Court of Appeals declined to apply the more deferential "reasonably related to legitimate penological objectives" standard established by this Court in *Turner v. Safley*, 482 U.S. 78, 87, 89-91 (1987). According to the Court of Appeals, *Turner's* holding is limited to cases involving "prisons" and does not apply to "jails" such as NCCC.

The question presented is:

Whether this Court's holding in *Turner v. Safley*, 482 U.S. 78, 89 (1987), that a prison regulation is constitutional if it bears a reasonable relation to a legitimate penological objective, applies to any detention facility whether it is called a jail, a prison or a correctional center?

PARTIES TO PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Ray E. Shain, plaintiff-appellee-cross-appellant, Peter Ellison, individually and as a Nassau County police officer,[1] John Doe, individually and as an assistant district attorney of Nassau County, the County of Nassau, Joseph Jablonsky, defendants-appellants-cross-appellees, and James H. Madden, individually and as a Judge of Nassau County, defendant-cross-appellee.

[1] Officer Ellison was incorrectly sued as John Ellison.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (App., 9 [1]) is reported at *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001). The opinion and order of the United States District Court for the Eastern District of New York (App., 44) is reported at *Shain v. Ellison*, 53 F. Supp.2d 564 (E.D.N.Y. 1999).

Statement of Basis of Supreme Court Jurisdiction

The judgment of the Circuit Court sought to be reviewed was filed on October 19, 2001 and a timely petition for panel rehearing with suggestion for rehearing *en banc* was denied on May 7, 2002. App., 3. On June 28, 2002, Ruth Bader Ginsburg, Associate Justice of this Court, granted petitioners County of Nassau and Joseph Jablonsky an extension of time until October 4, 2002 to file a petition for a writ of certiorari. App., 1. Jurisdiction to review the judgment of the Circuit Court is conferred by 28 U.S.C. Section 1254(1). Federal jurisdiction in the court of first instance was based on 28 U.S.C. Sections 1331 and 1343.

Constitutional Provision Involved

This case involves the following constitutional provision:

U.S. Const. Amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1] References to the Appendix are indicated by "App."

Statement of the Case

This petition seeks review of a Court of Appeals decision that undermines the safety of corrections officers and inmates of county jails, by unreasonably restricting the right to strip search misdemeanor arrestees who may be carrying dangerous weapons and narcotics. At issue is whether constitutional challenges to the policies and practices of local correctional facilities are governed by this Court's holding in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Review is sought to resolve a conflict among the circuits on this important question.

This case involves the strip search policy of the Nassau County Correctional Center ("NCCC" or "Correctional Center") in Nassau County, New York. Respondent claimed that NCCC's policy violated his Fourth Amendment right to be free from unreasonable search and seizure. Petitioner submits that the relevant test for assessing such a claim was set forth in *Turner*, which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89-90. Confronting the Court in *Turner* were constitutional challenges to regulations of the Missouri Division of Corrections. Those rules restricted correspondence between inmates at different prisons and prohibited inmates from marrying without the approval of the prison superintendent. The Court rejected the assertion that the regulations were subject to a heightened standard of scrutiny, on the grounds that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper the ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89. Instead, the Court fashioned the "reasonably related" test quoted above, in order to be "responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to

protect constitutional rights." *Id.* at 85 (internal quotation/ citation omitted).

In this case, the Court of Appeals rejected the application of *Turner* in favor of its own standard, first articulated in the pre-*Turner* decision of *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987). *Weber* holds that penological objectives, no matter how compelling, cannot justify strip searches of misdemeanor arrestees, absent reasonable suspicion that they are concealing contraband. Based on *Weber*, the Court of Appeals declared NCCC's policy to be contrary to law.

The Court of Appeals asserted that *Turner* applies exclusively to "prisons" and not to "jails" such as NCCC — "an artificial, untenable distinction," in the view of dissenting Judge Cabranes, which "creates a Circuit split where there was none — a Circuit split that calls out for resolution by the Supreme Court." App., 32. The circuits are "split" because, in contrast to the Second Circuit, the Fourth, Seventh and Ninth Circuits have expressly applied *Turner* in the county jail setting, with the Ninth Circuit squarely rejecting the jail/ prison distinction adopted by the Second Circuit here.

Like the dissent, the concurrence of Circuit Judge Katzmann also questioned the validity of the majority opinion. Although he felt "compelled to follow Circuit precedent," Judge Katzmann acknowledged that the "Circuit's choice to distinguish . . . between . . . jails and prisons is not necessarily persuasive to me. . . ." App., 31.

A. Respondent's Arrest And Incarceration For Threatening His Spouse

This case arose from the July 29, 1995 arrest of respondent Ray E. Shain for allegedly threatening to rape his estranged wife during a domestic dispute. App., 12. According to his spouse, Mr. Shain had a history of abusive behavior toward her. Mr. Shain was taken into custody by Nassau County

police officers and charged with first degree harassment under N.Y. Penal Law Section 240.25 — a misdemeanor. A pat-down search of Mr. Shain's person turned up a pocket knife, which he failed to surrender when specifically directed to empty his pockets. After arraignment on a family offense petition, Mr. Shain was remanded by the Court to NCCC, where he was processed into the facility. App., 13. As part of the intake procedure, Mr. Shain was instructed to disrobe and a male corrections officer conducted a non-invasive, visual body-cavity search, in order to detect weapons or contraband. App., 13, 47. Pursuant to NCCC policy, such searches are conducted in a private cubicle, and do not entail any physical contact. App., 47. Typically, the searches last no more than two minutes. App., 47.

The next morning, Mr. Shain was again strip-searched prior to being transported to an appearance in Nassau County Family Court. Eventually, various charges against Mr. Shain were withdrawn or adjourned in contemplation of dismissal. App., 13.

B. The Nassau County Correctional Center

The NCCC is located in Nassau County, Long Island, in the densely populated New York City metropolitan region. Adjacent to the Borough of Queens in the City of New York, Nassau County is itself a substantially urbanized area with a population of 1.3 million people. Given the community it serves, NCCC faces demands and challenges common to those faced by major metropolitan correctional facilities across the country. It is operational 24 hours a day, 365 days a year. In 1995, over 14,000 inmates were processed into the facility and on any given day approximately 1,800 inmates were housed there. App., 39. To operate the facility,[2] NCCC had approximately 1,100 employees on staff in 1995, in-

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[2] Under the Nassau County Charter, the Sheriff's Department is vested with authority to manage NCCC. Art. XX, Sec. 2003.

cluding 950 corrections officers responsible for maintaining security, order and discipline. *See* App., 39, 51-52. For the corrections officers, each day is divided into three tours. On average, there were 125 corrections officers on duty during each tour in 1995, resulting in an inmate to guard ratio of approximately 14 to one.

The NCCC inmate population includes both pre-trial detainees and convicted criminals. The convict population encompasses those serving terms of one year or less, and those awaiting transfer to upstate prison facilities, usually for more serious offenses. The inmate profile runs the gamut from those charged with minor misdemeanors to those convicted of the most serious violent crimes, such as rape and murder. App., 52. As in any correctional facility, there is a potential for explosive violence among the inmates. Of particular concern is the growing problem of gang infiltration, including the notorious "Crips" and "Bloods" street gangs. *See* App., 52. The security threat posed by gang members was severe enough to prompt the establishment of a special NCCC gang identification unit, to monitor the movements of gang members in an attempt to forestall conflict among the rival factions.

A random examination of NCCC files for the years 1996 and 1997 revealed that on six occasions, inmates were discovered to have either razor blades, a screw driver, a handcuff key, or a metal "shank" during the strip search. *See* App., 52. In addition, narcotics were found on eight occasions. App., 52. The consequences of any penetration of weapons into the facility are potentially lethal to guards and prisoners. Indeed, NCCC corrections officers have been attacked by inmates wielding razor blades, notwithstanding the strip search policy. Moreover, the raw numbers do not reveal the full extent of the need for strip searches. The existence of a strip search policy is itself a deterrent to smuggling. Once it becomes known that misdemeanor arrestees have an

opportunity to introduce contraband, attempts to smuggle weapons and drugs are likely to increase. According to corrections officials, this is especially true in the case of gang members, who may well subject themselves to misdemeanor arrest for the purpose of funneling weapons to their gang associates.

C. NCCC's Strip Search Policy

In order to promote the safety of officers and inmates, NCCC instituted a strip search policy to prevent the influx of weapons and contraband. The written policy is set forth, *inter alia*, in the Nassau County Sheriff's Department Policies and Procedures:

> All inmates admitted or discharged, while in civilian clothes, shall be segregated from other in-residence inmates to prevent possible transfer of contraband. (Rule 8.3)
>
> * * *
>
> The admitting process of new inmates shall include a thorough search of each inmate, to include a strip search and examination of all clothing for contraband, prior to their arrival in the housing area. (Rule 8.4)

As reflected in the rule, a primary purpose of the search is to facilitate examination of the inmate's clothing. The body search involves a strictly visual inspection of the hair, ears, mouth, underarms and rectum. In addition, male prisoners are directed to lift external genitalia for inspection. App., 13. As noted above, the searches are carried out in partitioned cubicles, do not entail physical contact and generally last under two minutes. (According to the officer who searched Mr. Shain, the search took approximately one minute. App., 47.) Male prisoners are searched by male corrections officers and female prisoners by female officers.

D. The District Court's Grant Of Summary Judgment

On July 29, 1996, Mr. Shain commenced an action in the United States District Court for the Eastern District of New York against various defendants including petitioners herein. The suit was brought under 42 U.S.C. Sections 1983 and 1988, and claimed multiple civil rights violations arising out of Mr. Shain's arrest and incarceration. Among his claims was a challenge to the constitutionality of NCCC's strip search policy. Mr. Shain sought both declaratory and injunctive relief, as well as unspecified monetary damages, including punitive damages. *See* App., 14.

While the District Court was "sympathetic to the legitimate security and safety needs expressed by the Nassau County Sheriff" (App., 45), it nevertheless granted plaintiff summary judgment on the unconstitutionality of the strip search policy, based on *Weber v. Dell* and the cases applying it.[3] *Weber* held that:

> [T]he Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband

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[3] While acknowledging the evidence put forward by NCCC to justify the policy, the District Court determined that "[g]iven the state of the law, however, the Court could not properly consider this evidence." *App., 53. See also id.* at 50: "In light of this precedent [*i.e., Weber v. Dell*], this court is precluded from considering the institutional concerns of the NCCC." However, the District Court noted that:

> a full consideration of the facts surrounding the NCCC and its particular concerns may have resulted in a finding that a one or two minute strip search . . . might well be warranted when balanced against the concerns of this particular institution. *App., 53.*

> based on the crime charged, the particular characteristics of the arrestee and/or the circumstances of the arrest.

804 F.2d at 802.

The District Court found that Nassau County and the Nassau County Sheriff were subject to monetary liability resulting from implementation of the policy.[4] App., 50.

E. The Court of Appeals' Divided Decision

The Court of Appeals affirmed the District Court's determination, also on the strength of the *Weber*-line of decisions. *See Shain, supra*, 273 F.3d at 62-63 (*citing Weber, Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988) and *Wachtler v. County of Herkimer*, 35 F.3d 77 (2d Cir. 1994)); App., 18.

To reach that result, the Court was compelled to distinguish several cases applying the *Turner* doctrine, including the Second Circuit's own decision in *Covino v. Patrissi*, 967 F.2d 73 (1992), which upheld a prison regulation permitting random strip searches, as well as the decisions of this Court in *Washington v. Harper*, 494 U.S. 210 (1990) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), both of which were prisoner's rights cases reaffirming the *Turner* analysis. The Court of Appeals determined that:

> *Turner*, *Washington*, *O'Lone* and *Covino* each approved a regulation of a state correctional facility or prison, but NCCC is a local correctional facility or jail. . . . Neither *Turner* nor *Covino* purports to address any issue other than *prison* regulations. Thus these cases can be read

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[4] The District Court granted defendants' motion to dismiss Shain's false arrest, malicious prosecution and abuse of process claims. App., 15. Subsequently, a jury found for defendants on respondent's excessive force claim and awarded no damages for the strip search. The District Court thereafter entered judgment granting Shain nominal damages of one dollar. App., 43a.

> consistently with *Weber* and its progeny by confining them to their facts and actual holdings.

App. 22-23.

Citing Black's Law Dictionary, the majority emphasized the supposed difference in the inmate populations of jails and prisons, declaring that "a prison is 'a state or federal facility of confinement of convicted criminals, especially felons. A jail, on the other hand, is 'a place where persons awaiting trial or those convicted of misdemeanors are confined.'" App., 22. Therefore, the majority reasoned, *Turner* was not controlling. The majority did not acknowledge that NCCC actually houses felons convicted of the major offenses, including crimes of violence, as well as pre-trial detainees and misdemeanants.[5]

Judge Cabranes dissented, based on his belief that the majority opinion "unnecessarily limits the reach of Supreme Court cases in this area" and "requires that correctional facilities such as NCCC be run in a manner that defies common sense." App., 32. He also observed that "our sister Circuits routinely apply *Turner*'s 'reasonably related' standard to cases involving jails." App., 35.

Judge Cabranes would have applied the *Turner* standard to NCCC because it "envisions a flexible multi-factor inquiry . . . [which] would permit administrators to craft body cavity search policies" based on the actual conditions prevailing at the Nassau facility. App., 43. "By contrast," Judge Cabranes noted, the *Weber* standard requires prison administrators to *ignore* these conditions and "focus on only one set of variables — those related to reasonable suspicion itself." App., 43.

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[5] The Court of Appeals remanded the case to the District Court for findings and conclusions regarding plaintiff's request for an injunction against future enforcement of the strip search policy. App., 25.

Circuit Judge Katzmann concurred in the majority opinion, but he too expressed serious reservations about its reasoning. Judge Katzmann believed himself bound by Second Circuit precedent to invalidate NCCC's policy. App., 31. However, with respect to the majority's distinction between jails and prisons and misdemeanors and felonies, Judge Katzmann doubted whether "either is a distinction I would make were I considering the question in the first instance." App., 31.

Reasons for Granting the Petition

Certiorari should be granted to resolve a split in the circuits and settle the important federal question raised in this petition. *See* "Considerations Governing Review on Certiorari," Sup. Ct. R. 10(a) and (c). The simple fact is that the Second Circuit ruling makes jails more dangerous, by making it more difficult for corrections personnel to intercept weapons and drugs. Certiorari is warranted to determine whether the Court of Appeals applied the correct standard when it superseded the professional judgment of corrections officials and struck down NCCC's strip search policy.

Strip searches are a highly sensitive matter. They are undeniably unpleasant for all concerned. Nevertheless, these searches are intended to prevent much graver violations of personal integrity, *i.e.*, violent assault by inmates armed with smuggled weapons or intoxicated with contraband narcotics. Strip searches are not a punishment. They are, in the judgment of professionals responsible for maintaining jail security, an unpleasant necessity, as are jails themselves. Understandably, inmates would generally prefer to avoid strip searches. Yet, inmates are the ultimate beneficiaries of strip search policies, inasmuch as they create a safer custodial environment.

A. There Is A Direct Conflict In The Circuits On Whether *Turner* Applies To "Jails" As Well As "Prisons"

The split in the circuit on this important federal question is clear and irreconcilable. As acknowledged in Judge Cabranes' dissent (but ignored by the majority), other circuits routinely employ the *Turner* test to resolve constitutional disputes involving "jails" (as defined by the Second Circuit) as well as "prisons."

Thus, in *Siddiqi v. Leak*, 880 F.2d 904 (7th Cir. 1989), the Seventh Circuit expressly held that *Turner* "set out the standard" for evaluating the constitutional claims of an inmate of the Cook County Jail. 880 F.2d at 909 *(citing, inter alia, Turner*, 482 U.S. at 89 and *O'Lone*, *supra*, 482 U.S. at 349). No distinction was drawn between jails and prisons.

Likewise, Ninth Circuit decisions consistently apply *Turner* when scrutinizing policies and practices of county jails. For example, *Friend v. Kolodzieczak*, 923 F.2d 126 (9th Cir. 1990) involved a challenge to a policy of the Alameda North County Jail. Implicitly rejecting the semantic distinction embraced by the Second Circuit, the Ninth Circuit characterized the claim as a challenge to "prison regulations" and analyzed it under the *Turner* and *O'Lone* tests. *Id.* at 127. This implicit rejection was made explicit in the subsequent decision in *Mauro v. Arapaio*, 188 F.3d 1054, 1058-62 (9th Cir. 1999) (*en banc*), *cert. denied*, 529 U.S. 1018 (2000), where the Court applied *Turner* to a claim involving the Maricopa County jail system. In his vigorous dissent, Circuit Judge Kleinfeld squarely confronted the *Mauro* Court with the alleged dichotomy between jails and prisons. "'Prisons' and 'jails' are not the same thing," argued Judge Kleinfeld, anticipating the position of the Second Circuit here. *Id.* at

1067. "Jails hold people pending trial, and for short punitive sentences after conviction. Prisons hold people convicted and sentenced to substantial incarceration, ordinarily for felonies. The case before us is a jail case, not a prison case." *Id.*(*citing* Black's Law Dictionary 834, 1194 (6TH ed. 1990)). Therefore, he concluded, *Turner* "is the wrong case," because it exclusively "applies to prisons. . . ." *Id.* Exactly like the Second Circuit here, Judge Kleinfeld cited Black's Law Dictionary to support an asserted Constitutional differentiation between jails and prisons. By rejecting Judge Kleinfeld's position, the Ninth Circuit set the stage for the clean circuit split created by *Shain*.

In addition to the Seventh and Ninth Circuit decisions cited by Judge Cabranes, the Fourth Circuit has also applied *Turner* to local detention facilities. In *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994), which involved the constitutional claims of a pre-trial detainee at the Horry County Detention Center in South Carolina, the Fourth Circuit expressly relied on *Turner* as well as *Thornburgh v. Abbott*, 490 U.S. 401 (1989), a subsequent decision applying the *Turner* standard. While acknowledging that these cases "did not involve pretrial detainees . . .," the court reasoned that "the concern for security is the same for pretrial detainees as for convicted inmates." 993 F.2d at 1082. "Accordingly," the Fourth Circuit held, "we shall apply the *Turner* standard to determine the constitutionality of the Detention Center's restrictions. . . ." *Id.*

In short, the Second Circuit says that *Turner* does not apply to jails, while the Fourth, Seventh and Ninth Circuits

say that it does.[6] This Court's intervention is needed to resolve this conflict among the Circuit Courts.[7]

B. The Substantive Standards In *Turner* And *Weber* Are Also In Direct Conflict.

The substantive standards at work in *Weber* and *Turner* conflict on several levels. First, these cases reflect fundamentally opposing views on the proper role of the courts in setting penal policy. *Turner*'s "relatively deferential 'reasonably related'" test recognizes the judiciary's limited institutional competence in the field of prison administration. App., 38. Without abandoning the judicial duty to safeguard individual rights, the *Turner* decision acknowledges that the "complex and intractable" problems which beset American correctional facilities are "'not readily susceptible of resolution by judicial decree.'" App., 38 *(quoting Turner*, 482 U.S. at 85). In the words of *Turner*:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task

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[6] The Sixth and Tenth Circuits too have applied *Turner* to claims involving county correctional facilities, albeit in nonbinding, unpublished opinions. *See Polk v. Parnell*, 1997 U.S. App. LEXIS 34812,*6, No. 96-5711 (6th Cir. December 8, 1997)(involving constitutional claims against officials of the county jail of Fulton County, Kentucky); *Thomas v. Leslie*, 1999 U.S. App. LEXIS 7795, *15-*19 (10th Cir. April 29, 1999) (relying on *Turner* to resolve challenge to regulation of Reno County Detention Center). These opinions are reproduced in the appendix at A-71 and A-54.

[7] Indeed, the Second Circuit's own jurisprudence remains internally conflicted in this area, despite the efforts of the Court below to bring harmony to the case law. As Judge Cabranes pointed out, the majority's holding fails to account for the fact that the Second Circuit has previously applied "*Turner* in a jail setting." App., 37 (*citing United States v. El-Hage*, 213 F.3d 74, 81-82 (2d Cir. 2000)).

> that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. *Id.* at 84-85.

In addition, when a dispute concerns a state or local facility, principles of federalism also come into play. *See id.*: "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."

As summed up by Judge Cabranes' dissent, "a basic purpose of the 'reasonably related' standard is to prevent the federal courts from becoming overly involved in the administration of corrections-related facilities that have chronic problems that the judiciary is, comparatively speaking, poorly-positioned to solve." App., 38-39.

In contrast, the Second Circuit endorses a more intrusive judicial role in the affairs of correctional institutions. Rather than defer to the judgment of state corrections officials, the *Weber* standard dictates a bright-line rule which these officials must follow, regardless of the conditions which prevail at their detention facilities. Under no circumstances may local correctional facilities strip-search misdemeanor arrestees without reasonable suspicion. *Weber* thus seeks to impose solutions to perceived correctional problems through judicial decree, the very approach cautioned against in *Turner*.

In comparison to *Turner*, the Second Circuit's approach accords much less weight to the administrative priorities set by those who manage detention facilities. This is demonstrated by the Circuit Court's willingness to discount the security concerns raised by NCCC officials in the case at bar. *See, e.g.*, the Circuit Court's determination that, despite the policy judgment of NCCC officials that a strip search is a necessary precaution for virtually all inmates, "[i]t is far less obvious that misdemeanor arrestees frequently or even

occasionally hide contraband in their bodily orifices." App., 20. *See also* App., 20-22 (rejecting NCCC's conclusion that "arraignment represents a crucial step in the criminal proceedings that justifies heightened security measures.") This inclination to second-guess the judgments and contradict the conclusions of professional penologists is inconsistent with the spirit of *Turner*.

Moreover, the differences between *Turner* and *Weber* are not merely philosophical. The specific legal standards in *Weber* and *Turner* are also not susceptible of reconciliation and the differences in the way they are applied must have a profound impact on prison administration. *Turner* sets forth a flexible balancing test that requires the reviewing court to consider a broad range of factors in assessing the lawfulness of a practice such as the NCCC's strip search policy. It thereby mirrors the decision-making process engaged in by the administrators themselves.

Under *Turner*, prison officials and reviewing courts are free to recognize that institutional conditions may justify a blanket strip search policy, even where individualized suspicion may be absent. The detainee's right to be free from unreasonable search is balanced against the safety and security needs at the particular facility in question. Again as noted by the dissent:

> In determining how this balance should be struck in the context of any particular facility, common sense dictates that a number of factors are relevant, including whether the facility is overcrowded; whether it is equipped with drug-sniffing dogs and metal detectors; whether it has been infiltrated by gangs; and whether prisoners have attempted previously to secrete contraband in a manner detectable only by cavity searches.

App., 43. "By contrast," Judge Cabranes further noted, "the 'reasonable suspicion' standard requires prison administrators

to focus on only one set of variables — those related to reasonable suspicion itself." App., 43. Corrections officials are constitutionally prohibited from considering any of the factors enumerated above — factors which the *Turner* test would leave them free to take into account. Clearly, then, there is a basic discrepancy between the flexible standard in *Turner* and the more rigid *Weber* approach. Because there is a clear split among the Courts of Appeals on this question of considerable importance, this is a fitting case for granting the writ.

C. The Issue of Strip Searches Is A Recurring Question Of Great Practical Importance To Local Corrections Officials

The Court of Appeals decision is of great practical significance to corrections officials because it hampers their ability to maximize safety and security at detention facilities. It rests on the dubious assumption that persons arrested for misdemeanors are unlikely to conceal weapons or narcotics, and that prison authorities are wrong to believe otherwise. It fails to consider that misdemeanor arrestees frequently have a history of more serious criminal violations, including felony convictions. It opens the door for inmates to coerce or cajole others, especially fellow gang members, into smuggling contraband. It does not account for the fact that in the typical jail, there are numerous opportunities for inmates to arrange to receive illicit material, for example, through unmonitored mail and telephone communications, or frequent contact visits. It gives insufficient weight to the fact that strip searches remain the most effective method for detecting contraband. While magnetometers and similar electronic devices are helpful, the technology is not infallible, and is not designed to detect narcotics. Strip searches are therefore an indispensable tool for maintaining a secure prison environment. Exempting an entire class of misdemeanor arrestees from these searches, as the Second Circuit does, compromises their effectiveness and makes jails less safe.

The "difficulty with the majority's holding is that it interprets the Constitution as requiring large, complex facilities such as the NCCC to be run less intelligently — and less safely — than ought to be the case." App., 42 (Cabranes, J., dissenting).

The Second Circuit rule and its unfortunate effects are not restricted to NCCC. Strip search policies have been curtailed at penal institutions throughout the Second Circuit, including the New York City Department of Corrections, the largest municipal detention system in the nation. The strip-search issue, moreover, is a recurring one for local detention facilities. Most recently, the issue surfaced in an July 24, 2002 federal district court opinion, which relied on the Court of Appeals decision to condemn the strip search policy at the Orange County Jail in Orange County, New York. *See Dodge v. County of Orange*, 2002 U.S. Dist. Lexis 13374, No. 02 Civ. 769 (S.D.N.Y. July 24, 2002).

Any weapon that passes into the prison population puts both officers and inmates at risk. Slashings and stabbings are a constant threat. By making the walls of detention facilities more porous for weapons and drugs, the Court of Appeal's decision below has increased these risks.

Conclusion

The petition should be granted.

Respectfully submitted,

LORNA B. GOODMAN
County Attorney
County of Nassau
Attorney for Petitioners
One West Street
Mineola, New York 11501
(516) 571-3015

LORNA B. GOODMAN*
DAVID B. GOLDIN
PETER J. CLINES
of Counsel.

* *Counsel of Record*

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K.SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, NY 10022-6102

Re: Nassau County, et al.
v. Ray E. Shain, et al.
Application No. 01A1004

Dear Mr. Millus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on June 28, 2002, extended the time to and including October 4, 2002.

This Letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By /s/ Ruth Jones

Ruth Jones
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, ny 10022-6102

Clerk
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of May two thousand two.

RAY E. SHAIN,

Plaintiff - Appellee - Appellant,

v. 00 - 7061

JOHN ELLISON, (Shield No. 761), individually and as Nassau County police officer; JOHN DOE, Individually and as an Assiatant District Attorney of Nassau County; THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKI,

Defendants - Appellant - Cross-Appellees.

JAMES H. MADDEN, individually and as a Judge of Nassau County,

Defendant-Cross-Appellee.

UNITED STATES COURT OF APPEALS
FILED
NOV. 9, 2001
Roseann B. Mackechnie,
Clerk
SECOND CIRCUIT

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant John Ellison, et al.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, CLERK

By: /s/ AUTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, ny 10022-6102

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at theUnited States Courthouse, Foley Square, in the City of New York, on the 19th day of October, two thousand and one.

BEFORE: Hon. Jose A. Cabranes,
Hon. Rosemary S. Pooler,
Hon. Robert A. Katzmann,
Circuit Judges.

Docket Nos. 00-706(L), 007069(XAP)

RAY E. SHAIN,

v. Plaintiff-Appellee-Cross-Appellant,

JOHN ELLISON, (Shield No. 761), individually and as a Nassau County police officer; JOHN DOE, individually and as an Assistant District Attorney of Nassau County; THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKY,

Defendants-Appellants-Cross-Appellees.

JAMES H. MADDEN, individually and as a Judge of Nassau County,

Defendant-Cross-Appellees.

UNITED STATES COURT OF APPEALS
FILED
NOV. 9, 2001
Roseann B. Mackechnie,
Clerk
SECOND CIRCUIT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the Judgment of said district court be and it hereby is AFFIRMED in part and REMANDED to the district court for further proceedings in accordance with the opinion of this Court.

A TRUE COPY
Roseann B. MacKechnie, CLERK

by:/s/_____
Deputy Clerk
FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

/s/ ARTHUR M. HELLER
Arthur M. Heller, Administrative Attorney

ISSUED AS MANDATE: 5/7/02

Mr. Paul F. Millus
Snitow Kanfer Holtzer & Millus
575 Lexington Avenue
New York, ny 10022-6102

RAY E. SHAIN, Plaintiff-Appellee-Cross-Appellant, -v- JOHN ELLISON, (Shield No. 761), individually and as a Nassau County police officer; JOHN DOE, individually and as an Assistant District Attorney of Nassau County; THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKY, Defendants-Appellants-Cross-Appellees, JAMES H. MADDEN, individually and as a Judge of Nassau County, Defendant-Cross-Appellee.

Docket Nos. 00-7061 (L), 00-7069 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October 19, 2000, Argued

October 19, 2001, Decided

COUNSEL:
ROBERT L. HERBST, Herbst & Greenwald, LLP (Gayle Pollack, on the brief), New York, NY; RAY E. SHAIN, Pro se, Williston Park, NY, for Plaintiff-Appellee-Cross-Appellant.

PAUL F. MILLUS, Snitow & Cunningham, LLP (Robert P. Devlin, on the brief), New York, NY, for Defendants-Appellants-Cross-Appellees County of Nassau and Joseph Jablonsky.

CAROL FISCHER, Assistant Solicitor General (Eliot Spitzer, Attorney General of the State of New York, Robert E. Forte, Deputy Solicitor General, and Michael S. Belohlavek, Assistant Solicitor General, on the brief), New York, NY, for Cross-Appellee [**2] Judge James H. Madden.

Herbst & Greenwald, LLP (Robert L. Herbst and Gayle Pollack of counsel), New York, NY, for Amici Curiae Putative Class Members in Augustin v. Jablonsky.

Emery Cuti Brinckerhoff & Abady PC (Richard D. Emery, Matthew D. Brinckerhoff, John R. Cuti, and Nina Morrison, of counsel), New York, NY for Amici Curiae 65,000 Class Members in Tyson v. City of New York and Plaintiffs in O'Day v. Nassau County.

Daniel L. Greenberg, Sarah Kerr, John Boston, Laura Johnson, New York, NY, for Amicus Curiae Legal Aid Society.

Michael D. Hess, Corporation Counsel of the City of New York (Larry A. Sonnenshein and Kathleen Alberton of counsel), New York, NY, for Amicus Curiae New York City Department of Correction.

JUDGES:
Before: CABRANES, POOLER, KATZMANN, Circuit Judges. Judge Katzmann concurs in a separate opinion; Judge Cabranes dissents in part in a separate opinion.

OPINION BY:
POOLER

OPINION:

POOLER, Circuit Judge:

This appeal requires us to determine whether it was clearly established in July 1995 that corrections officers in a local correctional facility could not perform a strip search including a non-intrusive examination of body cavities on an individual arraigned on misdemeanor charges unless the officers had reasonable suspicion that the individual possessed contraband or weapons. We hold that after this court's decisions in *Wachtler v. County of Herkimer,* 35 F.3d 77 (2d Cir. 1994), *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988), and *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986), no law enforcement officer reasonably could have believed that it was permissible to perform such a search absent individualized reasonable suspicion.

BACKGROUND

I. Shain's Arrest and Strip Search

On July 29, 1995, Nassau County police officers including Peter Ellison n1 responded to a 911 call from Dr. Donna Denier, who was then married to plaintiff Ray Shain, at the couple's residence. Denier showed Ellison a recently expired order of protection that required Shain to stay out of her bedroom. When Ellison realized that he could not arrest Shain for violation of the order of protection, he interviewed Denier because

[He] wanted to get a clearer picture of exactly what [Shain] did, to see if [he] could arrest him, if there was another charge that [he] could arrest him on besides the order of protection [and after the interview, he] determined that [he]

could arrest him minus the order of protection, without it.

Ellison testified that Denier told him Shain entered her room and threatened to rape her and that Ellison then believed he had probable cause to arrest Shain. In his police report, Ellison said:

COMP REPORTS AT TIME AND PLACE OF OCCURRENCE LAYING IN HER BED READING WHEN HER HUSBAND ENTERED ROOM. SHE TOLD HIM SEVERAL TIMES TO LEAVE AND HE STATED AGAIN, "I'M GOING TO FUCK YOU". SHE TOLD HIM TO LEAVE AGAIN AND FEARING FOR HER SAFETY SHE LEFT THE ROOM AND CALLED THE POLICE

Denier gave a more expansive account of her conversation with Ellison, claiming that she also told him that Shain previously had threatened her and been out of control and that he had thrown a table at her and swung a lamp at her on prior occasions.

n1 Shain wrongly sued Officer Ellison as John Ellison.

Ellison testified that when he arrested Shain for first degree harassment, a Class B misdemeanor, Shain acted in an agitated manner. Shain himself admitted that he did not turn over a pocket knife when he was asked to empty his pockets. After retrieving the pocket knife, Ellison transported Shain to the police station and "rear-cuffed" him to a manacle in a holding cell. Despite Shain's complaints that he had undergone a spinal fusion as an adolescent and was in severe pain, Ellison refused to take the cuffs off or to front cuff Shain. Ultimately, Ellison and another officer took Shain to the Nassau County Medical Center where a doctor who examined him reported that Shain was experi-

encing muscle spasms and lumbar sprain and ordered that he not be cuffed behind his back. Ellison spent the balance of the night at the central police station.

The next day, Shain appeared before Judge James H. Madden, a District Court judge sitting as a Family Court judge, who arraigned Shain on Denier's family offense petition. Without holding a hearing, Judge Madden remanded Shain to Nassau County Correctional Center ("NCCC") without bond.

Upon Shain's arrival at NCCC, Officer James Dantunono directed him to remove all his clothes and submit to a visual body cavity search. Dantunono looked in Shain's ears, his mouth, his hair and under his arms, and then made him turn around, bend over and spread his buttocks apart with his hands to facilitate a visual inspection of his rectum. Dantunono also directed Shain to hold up his external genitalia for inspection. Shain was again strip searched the next morning before he left to appear in Family Court. When Shain appeared in court, Family Court Judge Norman Feiden released him and allowed him to return to his home. Denier withdrew the Family Court petition on August 7, 1995. However, on or about August 28, 1995, the Nassau County District Attorney's Office filed harassment charges against Shain pursuant to N.Y. Penal Law § 240.26. Subsequently, these charges were dismissed pursuant to an adjournment in contemplation of dismissal.

II. NCCC's Strip Search Policy

Although NCCC claims that it does not subject individuals charged with misdemeanors and minor offenses to a strip search unless it has reasonable suspicion that the arrestees are concealing contraband or they have been remanded to NCCC's custody by a court, the written policies governing strip searches require corrections officers

to strip search each newly admitted inmate. In addition, all of the corrections officials who testified conceded that all newly admitted inmates were strip searched regardless of whether they were judicially remanded. Thus, while arrestees held briefly in holding cells may not have been strip-searched, all arrestees admitted to the jail were.

III. District Court Proceedings

Shain filed his lawsuit in the Eastern District of New York on July 29, 1996. In a second amended complaint dated July 7, 1997, Shain named Ellison; Judge Madden; "John Doe," an assistant district attorney; Joseph Jablonsky, the Sheriff of Nassau County; the County of Nassau and various anonymous corrections officers as defendants and requested damages for false arrest and imprisonment, malicious prosecution, abuse of process, the unconstitutional search of his person, assault and battery, and negligent and intentional infliction of emotional distress. He also sought a declaration that New York State Family Court Act § 155(2), which allowed his overnight incarceration without bail, and NCCC's strip search policy were unconstitutional and an injunction against their enforcement.

On April 16, 1997, by stipulation and order, the district court dismissed all claims against Judge Madden, leaving him as a defendant in name only to permit Shain to continue his challenge to Section 155(2). On January 9, 1998, the district court sua sponte dismissed Judge Madden as a defendant, finding that "plaintiff may not discontinue all claims against Judge Madden yet proceed to use him as a straw man to secure what is, in essence, an advisory opinion as to the constitutionality of § 155(2) of the Act."

On December 31, 1998, defendants moved for summary judgment on all of Shain's claims. Shain cross-moved for partial summary judgment establishing the unconstitu-

tionality of NCCC's strip search policy. In an oral decision, Judge Wexler granted defendants' motion to dismiss Shain's false arrest, malicious prosecution, and abuse of process claims but reserved the excessive force and strip search claims for trial. In a published opinion dated June 1, 1999, Judge Wexler granted Shain partial summary judgment establishing that the strip search policy was unconstitutional and that Jablonsky was not entitled to qualified immunity. *See Shain v. Ellison,* 53 F. Supp. 2d 564 (E.D.N.Y. 1999). More specifically, the court stated:

The policy of strip searching all misdemeanor and minor offense arrestees remanded to the NCCC, without requiring any suspicion that the remanded individual is concealing weapons or other contraband, violates the Fourth Amendment to the United States Constitution.

Id. at 568. The court noted that NCCC presented evidence of security problems that might be triggered by an order prohibiting it from strip searching all arrestees entering the facility but believed itself prohibited from considering this evidence by *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986) and *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988). *See* 53 F. Supp. 2d at 567-68.

A jury heard Shain's excessive force claim and evidence related to damages on the strip search claim. It rejected the excessive force claim and awarded Shain no damages for the strip search. Shain then moved to set aside the verdict and, in the alternative, for a new trial. The court denied Shain's motion and entered a judgment granting Shain $ 1.00 in nominal damages, declaring the strip search policy to be unconstitutional, and dismissing the action on the merits.

Defendants County of Nassau and Jablonsky appealed, arguing principally that (1) the district court erred

by failing to give proper deference to NCCC's security concerns; (2) *Weber* and *Walsh* do not govern this case because NCCC's policy was limited to arrestees who had been judicially remanded; (3) defendants had reasonable suspicion that Shain might be concealing a weapon and thus Shain lacked standing to challenge NCCC's general policy; and (4) Jablonsky was entitled to qualified immunity because the law concerning strip searches of misdemeanor pre-trial detainees was unsettled. Shain, who is an attorney, has submitted two briefs on his cross-appeal. In his counseled brief, Shain defends the district court's strip search holding while arguing that the district court should have granted injunctive relief and a new trial on damages. In his *pro se* brief, Shain contends that the district court erred by failing to grant him summary judgment on his false arrest claim; dismissing the malicious prosecution, abuse of process, and false arrest claims; dismissing his claims against Judge Madden and failing to reach the issue of the constitutionality of Section 155(2); and declining to grant a new trial on the excessive force claim.

Several *Amici Curiae* have submitted briefs on the strip search issue. The New York City Department of Correction, which has a strip search policy similar to NCCC's, seeks reversal of the district court's decision. Class counsel for the plaintiffs in *Tyson v. City of New York,* No. 97 Civ. 3762 (S.D.N.Y.) (JSM), and *O'Day v. Nassau County,* 99-CV-2844 (E.D.N.Y.) (DRH) (ARL) primarily request that the court not retreat from *Weber* and *Walsh* insofar as these decisions apply to pre-arraignment detainees who are the plaintiffs in these two lawsuits. Plaintiff's own counsel, who is also the attorney for the putative class members in *Augustin v. Jablonsky,* 2001 U.S. Dist. LEXIS 10276, CV-00-3126 (E.D.N.Y.) (DRH) (ARL) has submitted a brief on their behalf in opposition to the strip search policy. Finally, the Legal Aid Society, which represents

incarcerated individuals in New York, also has submitted a brief in opposition to NCCC's policy.

DISCUSSION

I. Strip Search Policy

A. Legality and Qualified Immunity

Although it appears likely that NCCC's strip search policy applied to all persons actually admitted to the jail whether they had been arraigned or not, we consider the legality of that policy as it applies to post-arraignment admittees to the jail because Shain himself was a post-arraignment admittee.

Before Officer Dantunono searched Shain in July 1995, we had decided three cases relevant to the issue before us. In *Weber,* we considered a Monroe County Jail policy "calling for strip/body cavity searches of all arrested persons other than those placed in 'holding cells,' which are the cells in which arrestees are sometimes placed when their release on bail is imminent." *Weber*, 804 F.2d at 799. The police arrested plaintiff Ann Weber on misdemeanor charges of making a false complaint and resisting arrest. *See id.* After jail officials booked Weber, they required her to remove her clothing and "expose her body cavities for visual inspection." *Id.* We held "that the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." 804 F.2d at 802. Although the defendants argued that their policy applied only to arrestees who could not make bail and thus were to be admitted to the general prison population, we found it unnecessary to remand for factual findings because "even the more narrowly drawn

policy would be unconstitutional." *Id.* We also rejected defendants' request for qualified immunity because all the circuits that had addressed similar policies had found them to be unconstitutional and because we long had stressed the intrusive nature of body cavity searches. *See* 804 F.2d at 803.

Walsh reaffirmed the *Weber* holding, *see Walsh*, 849 F.2d at 68-69, and *Wachtler* assumed *Weber's* applicability to the post-arraignment strip search of a person charged only with a misdemeanor. *Wachtler,* 35 F.3d at 81-82. We also found in *Wachtler* that the individual defendants were entitled to qualified immunity because the law did not clearly establish whether *Wachtler's* conduct was sufficient to trigger a reasonable suspicion. 35 F.3d at 81-82. However, we reinstated Wachtler's claims against the County of Herkimer pending a fuller development of the record. *See* 35 F.3d at 82. We said with respect to the County:

> If the standard procedure included routine strip-searches of misdemeanor arrestees, absent reasonable suspicion of weapons or contraband, and if no reasonable suspicion concerning Wachtler's possession of such items existed, then Wachtler would prevail.

Id. (citing Weber, 804 F.2d at 802-03).

Defendants contend that *Wachtler* does not indicate clearly that post-arraignment strip searches of persons charged with a misdemeanor are unconstitutional because the parties did not necessarily argue a distinction between pre- and post-arraignment searches. Be that as it may, we recognized that Wachtler had been arraigned and remanded to custody and nevertheless found that a policy that subjected him to a strip search without individualized reasonable suspicion would be unconstitutional. *See* 35 F.3d at 79, 82. Because the unconstitutionality of a post-arraign-

ment strip search absent reasonable cause was necessary to the court's holding in *Wachtler,* we reject defendants' argument.

Defendants next argue that we must not read *Wachtler* to prohibit strip searches of persons arrested for a misdemeanor after they have been arraigned because this reading would conflict with two Supreme Court decisions, *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), and *Block v. Rutherford,* 468 U.S. 576, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984). In *Bell,* the Supreme Court considered the constitutionality of a policy that subjected pre-trial detainees to strip searches after a contact visit. It reasoned that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell,* 441 U.S. at 546. Quoting *Pell v. Procunier*, 417 U.S. 817, 827, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974), the Court held that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." 441 U.S. at 548. Applying these principles, the Court upheld a visual, no-contact body cavity search of detainees after contact visits with persons from outside the institution. It said, "assuming for present purposes that ... pretrial detainees ... retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches were unreasonable." 441 U.S. at 558 (internal citations omitted).

In *Block,* the Supreme Court upheld jail policies prohibiting contact visits by pre-trial detainees and per-

mitting jail authorities to conduct random searches of cells in the absence of their pre-trial detainee occupants. However, its holding rests on a due process analysis and thus adds little to the holding of *Bell. See Block,* 468 U.S. at 590; *see also Weber,* 804 F.2d at 800.

In *Weber,* we said that *Bell* did not "read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances." *Weber,* 804 F.2d at 800. We also described three factors potentially supporting the determination that the *Bell* plaintiffs had no right to be free of a strip search: they already had been arraigned; they had failed to make bail; and they "had presumably chosen to receive visitors and to enjoy physical contact with them." *Id.* In *Wachtler,* we implicitly held that the mere fact of arraignment did not remove a misdemeanor arrestee from the purview of *Weber* and place him within the ambit of *Bell. See Wachtler,* 35 F.3d at 79, 82. The Wachtler result is not at odds with *Bell.* First, the *Bell* court did not address the issue of whether persons charged only with misdemeanors must be treated differently from persons charged with felonies. n2 Second, and more important, *Bell* authorized strip searches after contact visits, where contraband often is passed. *See Block,* 468 U.S. at 586. It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something. For the exceptions - for example, a person who is allowed to visit the bathroom unescorted before an arrest - reasonable suspicion may well exist.

n2 In fact, the Court saw no basis for distinguishing between pretrial detainees and convicted inmates because there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that

> in certain circumstances they present a greater risk to jail security and order. In the federal system, a detainee is com mitted to the detention facility only because no other less drastic means can reasonably assure his presence at trial. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates. This may be particularly true at facilities like the MCC, where the resident convicted in mates have been sentenced to only short terms of incarcera tion and many of the detainees face the possibility of lengthy imprisonment if convicted.
> *Bell,* 441 U.S. at 546 n.28 (internal citations omitted).

Finally, defendants argue that arraignment represents a crucial step in criminal proceedings that justifies heightened security measures. In *Block*, the Supreme Court said that "the very fact of nonrelease pending trial ... is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility" because of the ease of obtaining bail or release on one's own recognizance. *Block,* 468 U.S. at 583. The same cannot be said of a misdemeanor arrestee in New York because he *must* be released on his own recognizance or granted bail. *See* N.Y. Crim. Proc. L. § 170.10(7). It is only because Denier proceeded civilly against Shain in Family Court that the judge could hold him without bail and without considering the statutory factors relevant to criminal detainees despite the fact that he was charged only with a misdemeanor. *Compare* N.Y. Fam. Ct. Act § 155(2) *with* N.Y. Crim. Proc. L. § 510.30(2)(a). Although a New York felony defendant's post-arraignment detention may well be an indicator of an increased security risk, a person charged with a misdemeanor who remains in jail in New York after arraignment probably does so because (a) he

cannot afford the bail set; (b) he refuses to post bail; or (c) he was arraigned on a Family Court matter, *see* N.Y. Fam. Ct. Act. § 155, Douglas J. Besharov, Practice Commentary (discussing abuse of Section 155). None of these scenarios creates a reasonable suspicion that the alleged offender has secreted contraband or a weapon.

The dissent, albeit not the defendants or the amicus who supports defendants' position, argues that a separate line of Supreme Court cases employing a different analytical model controls the outcome of this appeal. These cases hold that a reasonable relation to a legitimate penological interest suffices to establish the constitutionality of a *prison* regulation. *Washington v. Harper,* 494 U.S. 210, 223, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987); *Turner v. Safley,* 482 U.S. 78, 87, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). Between *Walsh* and *Wachtler,* we employed the *Turner* model to uphold the legality of a strip search that took place in a prison. *Covino v. Patrissi,* 967 F.2d 73 (2d Cir. 1992). Covino, who had been charged with kidnapping a child under the age of sixteen, *id.* at 74 n.1, was housed in a state correctional facility where he was commingled with sentenced inmates. *Id.* at 75. We upheld the pertinent regulation, which allowed random strip searches of inmates, despite Covino's pretrial detainee status because the regulation was "reasonably related to legitimate penological interests." *Id.* at 78 and n.4. *Turner, Washington, O'Lone* and *Covino* each approved a regulation of a state correctional facility or prison, but NCCC is a local correctional facility or jail. A prison is"[a] state or federal facility of confinement for convicted criminals, especially felons." BLACK'S LAW DICTIONARY 1213 (7th ed. 1999). A jail, on the other hand, is "[a] place where persons awaiting trial or those convicted of misdemeanors are confined." Id. at 838. This

distinction is reflected in New York where state correctional facilities, commonly referred to as prisons, house those convicted of the most serious crimes and local correctional facilities or jails house persons convicted of minor crimes and pre-trial detainees. See N.Y. Crim. Proc. L. § 430.20(2),(3); N.Y. Penal L. § § 70.00(1), 70.15.

Despite the limitation of *Turner, Washington, O'Lone,* and *Covino* to prison regulations and the substantial difference between jail and prison populations, the dissent contends that *Turner* implicitly overruled *Weber.* We disagree. We start with the proposition that we have "no authority to depart from Second Circuit precedent, unless it has been overruled in banc or by the Supreme Court." *Leecan v. Lopes,* 893 F.2d 1434, 1443 (2d Cir. 1990). Additionally, we should not lightly assume that two prior cases of this court are inconsistent, and we must accept a plausible reading of a case that renders it consistent with other Second Circuit precedent even where an alternative reading exists. *See, e.g., Rocket Jewelry Box v. Noble Gift Packaging,* 157 F.3d 174, 176 (2d Cir. 1998). Neither *Turner* nor *Covino* purports to address any issue other than prison regulations. Thus, these cases can be read consistently with *Weber* and its progeny by confining them to their facts and actual holdings. n3 The dissent's arguments for "assuming that when the *Turner* Court developed the 'reasonably related' standard, it intended for it to apply to facilities like NCCC" may be relevant to whether the *Turner* line of cases should be extended to jails by the Supreme Court, but they are not relevant to the question of whether *Turner* overruled *Weber.* **[Dissent, *infra,* at 8]**

n3 A panel of this court recently stated in dicta that "peno logical interests are ... arguably not an appropriate guide for the pretrial detention of accused persons" because penologi-

cal interests relate to convicted persons. *Benjamin v. Fraser,* 2001 U.S. App. LEXIS 19666, No. 00-9093, 00-9095, 2001 WL 1012247, * 9 n.10 (2d Cir. Sept. 5, 2001). Because we applied *Turner* to the rights of a pretrial detainee who had been charged with a serious crime and who was commingled with sentenced inmates in a state prison in *Covino*, we do not rely solely on Shain's status as a pretrial detainee.

The district court therefore correctly held that because it was clearly established in 1995 that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons, Jablonsky was not entitled to qualified immunity. The illegality of the sheriff's policy also provides the necessary basis for affirming the County's liability. *See Weber,* 804 F.2d at 803 (holding Monroe County liable for strip search policy implemented by its sheriff).

B. Standing

Even assuming the illegality of NCCC's policy, defendants argue that Shain cannot complain because NCCC had reasonable suspicion concerning him based on the court remand and on facts known by law enforcement personnel other than Dantunono, the officer who actually performed the strip search. We disagree. Although searching officers may rely on information provided to them by their colleagues, *see Velardi v. Walsh,* 40 F.3d 569, 574 (2d Cir. 1994), there is no evidence that Ellison, who was employed by the Nassau County Police Department, or the officers who accompanied Shain to and from court, communicated any information to Dantunono. Thus, the only information Dantunono knew and the only fact NCCC required for a strip search was the fact of the remand. n4 This remand merely required NCCC to receive and detain Shain

until his Family Court appearance and indicated that Shain had been charged under Article 8 of the Family Court Act. Because Article 8 covers offenses ranging from disorderly conduct to assault, the remand itself could not provide reasonable and individualized suspicion. In fact, Lieutenant John Considine, commanding officer of NCCC's operations unit, conceded that the information in Shain's file would not have provided reasonable suspicion that he possessed contraband.

> n4 As noted previously, we accept for the sake of argument that NCCC did require a judicial remand, although the evi dence appears to establish that it did not.

C. The Injunction

Although plaintiff requested an injunction against future enforcement of the blanket strip search policy, the district court judgment neither explicitly granted nor denied this request. Plaintiff's attorney objected to the proposed judgment, in part, on the basis that it did not address the injunction. Plaintiff now claims that the district court erred by failing to grant an injunction once the illegality of the strip search procedure was established. Defendants respond that the district court did not err because NCCC voluntarily suspended its policy pending appeal. However, the record before us is not adequate to determine whether injunctive relief is necessary, and the district court did not make findings of fact or conclusions of law relevant to the grant or denial of injunctive relief. Therefore, we remand to allow the district court to make the necessary findings and conclusions. *See* Fed. R. Civ. P. 52(a).

D. Refusal of New Trial on Damages

In his charge, the district judge instructed the jury

that if it found defendants had violated Shain's constitutional rights but he had not suffered a compensable injury, it should award nominal damages not to exceed one dollar. The judge also instructed the jury that he previously had found defendants' strip search policy to be unconstitutional. When the jury returned its verdict, the court asked what compensatory and punitive damages the jury had awarded on the strip search claim and the foreman responded "Zero." The judge did not ask what nominal damages the jury had awarded. Plaintiff then moved to set aside the verdict and for a new trial, and the court denied both motions. However, the court did enter a nominal damages judgment of one dollar. On appeal, Shain argues only that the court should have granted him a new trial on damages.

We review a district court's decision not to grant a new trial on damages solely for abuse of discretion. *See Amato v. City of Saratoga Springs,* 170 F.3d 311, 314 (2d Cir. 1999). The district court should not grant such a motion "unless [it] is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Id.* (internal quotation marks omitted). Shain cannot meet this high standard. He produced no objective medical or psychological testimony linking a psychological or physical injury to the strip search, and although he and his former girl friend testified that he was emotionally traumatized by the search, the jury was not required to credit this testimony. *See id.* at 314-15. Nor was it error for the court to correct the jury's verdict by entering a nominal damages award of one dollar since nominal damages are appropriate for the violation of a constitutional right. *See Dawes v. Walker,* 239 F.3d 489, 497 (2d Cir. 2001) (collecting cases holding that it is error not to award nominal damages where a constitutional violation is established).

II. False Arrest

In order to make out a New York common law or Section 1983 claim for false arrest or imprisonment, plaintiff must demonstrate that defendant intended to confine him, he was conscious of the confinement, he did not consent to the confinement, and the confinement was not otherwise privileged. *See Singer v. Fulton County Sheriff,* 63 F.3d 110, 118 (2d Cir. 1995). An arrest made on probable cause is privileged, and probable cause exists "when the arresting officer has knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Id.* at 119 (internal quotation marks omitted). The officer may rely on the victim's allegations. *See Martinez v. Simonetti,* 202 F.3d 625, 634 (2d Cir. 2000).

New York Penal Law § 240.25, which defines first degree harassment, states in relevant part:

A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

Ellison's report of the incident stated that Denier told him Shain entered her bedroom, refused several requests to leave, and threatened to rape her. n5 We find that Shain's alleged refusal to leave the room after repeated requests coupled with his alleged threat to rape Denier constituted a course of conduct that could reasonably have caused Denier to fear for her safety. *See People v. Murray,* 167 Misc. 2d 857, 861, 635 N.Y.S.2d 928 (N.Y. Crim. Ct.

1995) (finding course of conduct within the meaning of the harassment statute where "defendant walked along side the complainant to her office, barred her way when she sought to escape inside [and] continued to stalk her as she retreated up the street [and] forcibly prevented her from obtaining assistance from [a] parked van" although the conduct only lasted five to eight minutes). Therefore, we affirm the district court's dismissal of Shain's false arrest claim.

n5 We adopt Ellison's account rather than Denier's more expansive description because the false arrest claim was dismissed on a motion for summary judgment.

III. Malicious Prosecution

In order to sustain a claim for malicious prosecution, Shain must demonstrate, among other things, that the prosecution terminated in his favor. *See, e.g., Murphy v. Lynn,* 118 F.3d 938, 947 (2d Cir. 1997). Because an adjournment in contemplation of dismissal is not considered to be a favorable termination, Shain cannot sustain his malicious prosecution claim based on the criminal proceeding. *See id.* at 949. Nor can Shain rely on Denier's withdrawal of her Family Court petition because Denier is not a defendant in this lawsuit. We therefore affirm the district court.

IV. Abuse of Process

"[A] malicious abuse of process claim lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process." *Cook v. Sheldon,*

41 F.3d 73, 80 (2d Cir. 1994). Bringing a defendant before a judge for arraignment satisfies the first element. *See id.* To show improper motive, Shain relies on Ellison's testimony that he knew Denier from the hospital and that after he found the order of protection had expired, he interviewed her further to determine whether there was another basis to arrest Shain. These allegations do not show intent to do harm without excuse or justification. Ellison's superficial acquaintance with Denier hardly suggests improper motive, and his continuance of the investigation when he found the order of protection had expired was merely good police work. The district court properly dismissed this claim.

V. Excessive Force

Shain contends that he also is entitled to a new trial on his excessive force claim principally because the court instructed the jury that Ellison could use sufficient force to arrest Shain. As we have found that Ellison did have probable cause to arrest Shain, the charge was not erroneous. *See Calamia v. City of New York,* 879 F.2d 1025, 1034-35 (2d Cir. 1989). Shain also argues that the court abused its discretion by admitting Denier's testimony concerning his past abuse and her account of this abuse to Ellison. However, what Denier told Ellison was relevant to the jury's determination of whether Ellison used excessive force by rear cuffing Shain. Therefore, the district court did not abuse its discretion.

VI. Judge Madden and Section 155(2) Claim

The parties stipulated to dismiss all claims against Judge Madden but to keep him as a nominal defendant for the purpose of testing the constitutionality of Family Court Act § 155(2). The district court initially "so ordered" this stipulation but later dismissed the claims against Judge Madden in their entirety without directly ruling on

plaintiff's claim that Section 155(2) is unconstitutional. The district court did not err because (1) at the time the court issued its *sua sponte* order (1) there was no realistic danger that Shain would face the same harm again and (2) there was no defendant against whom Shain could have recovered damages. Denier withdrew her Family Court petition on August 7, 1995, and there is no allegation that she ever filed another one. By the time Judge Wexler issued his order, the parties had been divorced for over a year. Because Shain could not show "that these same parties are reasonably likely to find themselves again in dispute over the issues raised in this appeal," he lacked a legally cognizable stake in seeking an injunction or a declaratory judgment. *Muhammad v. City of New York Dep't of Corrections,* 126 F.3d 119, 124 (2d Cir. 1997) (internal quotation marks omitted). Nor could Shain have obtained damages from any of the defendants because Judge Madden is protected by judicial immunity, see Stump v. Sparkman, 435 U.S. 349, 364, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978), and the remaining defendants bore no responsibility for Shain's continued incarceration after the judicial remand.

CONCLUSION

We affirm the district court's judgment except as to the failure to rule explicitly on Shain's request for injunctive relief against NCCC's strip search policy. With respect to that policy, we remand to the district court for further proceedings in accord with this opinion.

CONCUR BY:
ROBERT A. KATZMANN

CONCUR:

ROBERT A. KATZMANN, concurring:

I join in Judge Pooler's opinion in this challenging case. Unlike Judge Cabranes in his thoughtful dissent, I believe it reaches the result required by the precedent of this Circuit with respect to the standard to be applied to cavity searches in cases such as this one. In short, *Turner v. Safley,* 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), and its progeny deal with prison regulations as they are applied to individuals charged with or convicted of felonies, while *Weber v. Dell,* 804 F.2d 796 (2d Cir. 1986), *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988), and *Wachtler v. County of Herkimer,* 35 F.3d 77 (2d Cir. 1994), concern the treatment of misdemeanor arrestees being held in jails. Because there has been no explicit indication from the Supreme Court that it would apply its "reasonably related to penological interests" standard (rather than a "reasonable suspicion" standard) to cases involving misdemeanor arrestees being held in jail, I believe we are compelled to follow Circuit precedent, which distinguishes between these two types of cases. As *Wachtler* was decided well after *Turner,* it appears to me that this Circuit's approach to such cases is unchanged after *Turner.* I write separately to emphasize that while this Circuit's choice to distinguish for these purposes either between misdemeanors and felonies or between jails and prisons is not necessarily persuasive to me - and in fact I am not sure either is a distinction I would make if I were considering the question in the first instance - I do think that these distinctions are required by our earlier precedents. Because these precedents have not, in my view, been squarely overruled, I believe we have no choice but to apply the "reasonable suspicion" standard to the facts of this case.

DISSENT BY:
JOSE A. CABRANES (In Part)

DISSENT:

JOSE A. CABRANES, *Circuit Judge,* dissenting in part:

I respectfully dissent from the majority's decision to evaluate the constitutionality of the cavity search at issue here under the "reasonable suspicion" standard we developed in *Weber v. Dell,* 804 F.2d at 802 (2d Cir. 1986), rather than under the "reasonably related to legitimate penological objectives" standard subsequently articulated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

In reaching this decision, the majority subjects Nassau County to liability for having an assertedly unconstitutional cavity-search policy, and subjects an individual defendant to liability for implementing it. Moreover, the majority remands the cause for a determination as to whether the District Court should enjoin the Nassau County Correctional Center ("NCCC") from continuing to conduct a cavity search of all people admitted to the facility.

The majority's decision is based on an artificial, untenable distinction between "prisons" and "jails," and creates a Circuit split where there was none—a Circuit split that calls out for resolution by the Supreme Court. In my view, the majority's decision finds no warrant in the Supreme Court's jurisprudence and, indeed, substantially and unnecessarily limits the reach of the leading Supreme Court cases in this area. In resolving the cavity-search issue as it does, the majority also requires, by what the majority holds are the dictates of the Constitution, that correctional facilities such as the NCCC be run in a manner that defies common sense.

Accordingly, I dissent from the holding that the applicable standard to evaluate the constitutionality of a cavity search in a jail is "reasonable suspicion" rather than

"reasonably related to a legitimate penological interest." n1 I write briefly to explain why.

> n1 I agree with the majority as to its disposition of plaintiff-appellee-cross-appellant Ray E. Shain's false arrest, malicious prosecution, abuse of process, and excessive force claims, as well as with its disposition of his challenge to the constitutionality of the Family Court Act § 155(2). As to these issues, I concur in the reasoning and result of the majority opinion.

As the majority notes, in *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), we developed a standard for assessing the constitutionality of cavity searches of arrestees: The Constitution, we held, "precludes prison officials from performing ... cavity searches of *arrestees charged with misdemeanors or other minor offenses* unless the officials have a *reasonable suspicion* that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." 804 F.2d at 802 (emphasis added). In *Walsh v. Franco,* 849 F.2d at 68-69 (2d Cir. 1988), and *Wachtler v. Herkimer* County, 35 F.3d at 81 (2d Cir. 1994), we evaluated the constitutionality of cavity searches under *Weber's* "reasonable suspicion" standard.

Nearly one year after our decision in *Weber,* the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. at 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); *see also Washington v. Harper*, 494 U.S. at 224, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (holding, *inter alia,* that "*Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights"); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987) (apply-

ing *Turner* and noting that "legitimate penological interests" include "deterrence of crime, rehabilitation of prisoners, and institutional security"). In *Covino v. Patrissi,* 967 F.2d 73 (2d Cir. 1992), we evaluated a cavity search under *Turner's* "reasonably related" standard, and held that an arrestee may, in some circumstances, be subjected to a cavity search "in the absence of an ... individualized suspicion justifying the search," 967 F.2d at 77-78—that is, even when there is no "reasonable suspicion" of the kind required by *Weber.*

The question here is this: Should we assess the constitutionality of the NCCC's cavity search policy ("policy") under *Weber's* "reasonable suspicion" standard (a standard we set forth) or under *Turner's* "reasonably related" standard (a standard the *Supreme Court* set forth)?

The answer to this question, thus posed, seems obvious enough—*Turner,* as a case decided by the Supreme Court, must prevail. But resolving the question is complicated by the fact that, regrettably, our cases decided after *Turner* pull in different directions: *Walsh* and *Wachtler* suggest that *Weber's* "reasonable suspicion" standard is controlling here, and *Covino* suggests that *Turner's* "reasonably related" standard is governing.

The majority sidesteps this difficulty by holding that the "reasonably related" standard is controlling where the relevant correctional facility is a "prison" (as was assertedly the case in *Covino*), and that we must apply the "reasonable suspicion" standard that we enunciated in Weber and its progeny where the relevant correctional facility is a "jail" (as was assertedly the case in *Weber, Walsh, Wachtler,* and, as the majority states, here). *See* MAJORITY OPINION, ante, at 14.

At first glance, ordering our cases in this manner is appealing: As a general matter, it is the duty of panels reasonably to harmonize our precedents, *see, e.g., Rocket Jew-*

elry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d at 176 (2d Cir. 1998) ("Every panel of this court is bound by the decisions of earlier panels ...."), and the jail/prison distinction renders our caselaw internally coherent by shoehorning all-but-contradictory lines of precedent into apparently distinct doctrinal categories.

However, the distinction between these categories is illusory, and I believe that organizing our caselaw along the jail/prison axis is error.

As an initial matter, the distinction drawn by the majority between jails and prisons is wholly unprecedented. The majority points to no cases that differentiate between jails and prisons in the manner that it suggests, and our sister Circuits routinely apply *Turner's* "reasonably related" standard to cases involving jails. n2

> n2 *See, e.g., Mauro v. Arpaio,* 188 F.3d 1054, 1058-63 (9th Cir. 1999); *Friend v. Kolodzieczak,* 923 F.2d 126, 127-28 (9th Cir. 1991); *Siddiqi v. Leak,* 880 F.2d 904, 908-10 (7th Cir. 1989); *see also, e.g., Rogers v. Arbisi,* 1996 U.S. Dist. LEXIS 2278, No. 93 C 20237, 1996 WL 89346, at *5 (N.D. Ill. Feb. 28, 1996); *Muhammad v. City of N.Y. Dept. of Corrections,* 904 F. Supp. 161, 197 (S.D.N.Y. 1995); *Shaheed v. Winston,* 885 F. Supp. 861, 867-68 (E.D. Va 1995), *aff'd on other grounds* 161 F.3d 3 (4th Cir. 1998) (table); *Pippins v. Adams County Jail,* 851 F. Supp. 1228, 1234 (C.D. Ill. 1994).

They do so with good reason: There is no basis in the Supreme Court's jurisprudence for limiting *Turner's* "reasonably related" standard to cases involving correctional institutions denominated "prisons." It is true, of course, that the "reasonably related" standard nominally applies to "prison regulations." *See Turner,* 482 U.S. at 89

(emphasis added). But the term "prison" is most frequently used generically to describe *any* government facility—including a "jail"—that function primarily as a place for the confinement of people involved in the criminal justice system. *See* BLACK'S LAW DICTIONARY 1194 (6th ed. 1990) ("prison," first definition: "A public building or other place for the confinement of persons, whether as a punishment imposed by the law or otherwise in the course of the administration of justice") (emphasis added). n3

> n3 To be sure, "prison" is sometimes used in a manner that suggests a contrast with a "jail." *See* BLACK'S LAW DICTIONARY 1194 (6th ed. 1990) ("prison," third definition: "institutions ... distinguished from ... jails"). But that is relatively rare. It is more common to treat "jail" and "prison"—both of which are non-technical terms to everyone other than students of penology—as virtual synonyms. *See id.* (defining "prison" in a manner that encompasses "jail"); *id.* at 834 ("jail," first non-"obsolete" definition: "prison"). Consider, for example, *Weber*. In the majority's typology, *Weber* concerns jails, not prisons. But we held there that "*prison* officials" may not take certain actions. *Weber,* 804 F.2d at 802 (emphasis added); *see also* 804 F.2d at 804 (describing the need "to defer to the judgment of prison officials") (emphasis added). Any possible distinction between prisons and local jails apparently did not make an impression on the *Weber* panel, and, as the definitions quoted above suggest, the *Weber* panel's conflation of jail and prison is not merely a matter of linguistic imprecision. Rather, "jail" and "prison" are all-but interchangeable.

This said, to the extent that there is a sharp, commonly agreed upon distinction between the terms, it is that prisons hold people convicted of crimes, and jails hold people merely charged with crimes. *See* BLACK'S LAW DICTIONARY at 834 (defining "jail"). But here, prisons and jails cannot be differentiated on this basis. The majority distinguishes *Covino,* in which we applied *Turner's* "reasonably related" standard, as a case that involved a prison,

not a jail. *See* MAJORITY OPINION, ante, at 14-15. But the plaintiff in-that case had not been convicted of a crime when he was searched—he had merely been charged with a crime. *See Covino,* 967 F.2d at 78 n.4. Accordingly, if "prison" means a correctional facility that houses those convicted of crimes,as the majority suggests, *Covino* would have been a "jail" case, not a "prison" case, and we would have applied *Weber's* "reasonable suspicion" standard. But we did not do so; instead, we applied *Turner's* "reasonably related" standard. *See Covino,* 967 F.2d at 77-78; *accord United States v. El-Hage,* 213 F.3d 74, 81-82 (2d Cir. 2000) (applying the *Turner* standard in a "jail" setting—that is, to assess a pre-trial detainee's constitutional claim).

There is no indication that the *Turner* Court intended to depart from this well-settled, non-technical meaning of the word "prison."

First, *Turner's* "reasonably related" standard, which, as noted, concerns "prison regulations," was itself based on four cases that concerned "prisoners' rights," *see Turner,* 482 U.S. at 86: (1) *Pell v. Procunier,* 417 U.S. 817, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974), (2) *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977), (3) *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), and (4) *Block v. Rutherford,* 468 U.S. 576, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984). *See Turner,* 482 U.S. at 86-89 (discussing these cases). Of these "prisoner's rights" cases, one case—*Procunier*—concerned what the majority would call a "prison"; but another—*Jones*—involved both a prison and a jail, *see Jones,* 433 U.S. at 122, and two of them—*Block* and *Bell*—exclusively concerned jails, *see Block,* 468 U.S. at 578-79, *Bell,* 441 U.S. at 524. This suggests that there is no distinction of constitutional magnitude between jails and prisons. If there were such a distinction, the *Turner*

Court would not have elided the difference between "jail" cases and "prison" case by characterizing certain "jail" cases (*Block, Bell,* and perhaps *Jones*) as "prisoners' rights" case. *See Turner,* 482 U.S. at 86. And similarly, the *Turner* Court would not have—indeed, could not have—derived from "jails" cases (*Block, Bell,* and perhaps *Jones*) a standard that does not apply to them, but that applies only to what the majority would term a "prison" case.

Second, it is clear from *Turner's* rationale that the "reasonably related" standard was not intended to apply only to those institutions encompassed in the majority's narrow definition of "prison." The *Turner* Court adopted the relatively deferential "reasonably related" standard as a means of accommodating two distinct imperatives—first, protecting individual rights; and second, recognizing that "the problems of prisons in America are complex and intractable, and ... are not readily susceptible of resolution by [judicial] decree." 482 U.S. at 85. As the *Turner* Court explained:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate prison authorities.

Id. at 84-85. In other words, a basic purpose of the "reasonably related" standard is to prevent the federal courts from becoming overly involved in the administration of

corrections-related facilities that have chronic problems that the judiciary is, comparatively speaking, poorly-positioned to solve. n4

> n4 *See Washington,* 494 U.S. at 223-24 (stating that adoption of the "reasonably related" standard in *Turner* "was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration"); *cf. Turner*, 482 U.S. at 89 ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision mak ing process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.") (internal citations and quotation marks omitted).

But facilities that fit this description are as likely to be denominated "jails" as "prisons." The NCCC is an apt example. It operates 365 days a year and 24 hours a day. When Mr. Shain was subjected to a cavity search there, the NCCC employed 950 corrections officers and housed, on an average day, 1,800 inmates. Every year, more than 14,000 people are introduced into the NCCC population. Of those who are housed at the NCCC, some have been sentenced to terms of one year or less; some have been sentenced to longer terms of imprisonment and are awaiting transfer to state-run correctional facilities in upstate New York; and others have been charged with a range of crimes, including violent felonies.

In short, the NCCC is a large, complex facility. Running it undoubtedly "requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government," and it is therefore reasonable to assume that its problems, whatever they might be, are not "readily susceptible of resolution by [judicial] decree." *Turner,* 482 U.S. at 84-85.

Accordingly, the rationale for the "reasonably related" standard applies as forcefully to the NCCC as it would to a facility formally called a prison, and we must therefore assume that when the *Turner* Court developed the "reasonably related" standard, it intended for it to apply to facilities like the NCCC. But by introducing an artificial distinction between prisons and jails, the majority substantially limits *Turner's* reach—and removes institutions like the NCCC from the ambit of the "reasonably related" standard. n5

> n5 As noted, by distinguishing our cases along a jail/prison axis, the majority hopes to reconcile our precedents with one another. *See ante* at [3]. In this case, however, we need not attempt to do so. As a matter of logic, our application of *Weber's* "reasonable suspicion" standard in *Walsh* and *Wachtler* necessarily rested on a *sub silentio* holding that our decision in *Weber* survived the Supreme Court's subsequent decision in *Turner.* (I characterize this holding as sub silentio because neither *Walsh* nor *Wachtler* mention *Turner,* and there is no indication that the parties brought *Turner* to the attention of the *Walsh* or *Wachtler* panels.) But *sub silentio* holdings do not bind subsequent panels. *See, e.g., Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 49 (2d Cir. 2000); *Getty Petroleum Corp. v. Bartco Petroleum Corp.,* 858 F.2d 103, 113 (2d Cir. 1988). *See generally Webster v. Fall,* 266 U.S. 507, 511, 69 L. Ed. 411, 45 S. Ct. 148 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be

considered as having been so decided as to constitute precedents."). Moreover, when a panel bases a decision entirely on Circuit precedent that has been implicitly overruled by the Supreme Court—as I believe *Weber* was by *Turner*—panels of our Court need not hew to the panel decision. *See, e.g., Zervos v. Verizon,* 252 F.3d 163, 167 (2d Cir. 2001) (collecting cases).

The majority justifies its formalistic cabining of *Turner*—and its concomitant holding that it is *Weber's* "reasonable suspicion" standard that applies in jails—by reference to the "substantial difference between jail and prison populations." MAJORITY OPINION, ante, at 14. However, factors such as the composition of a facility's population—or, indeed, the composition of the portion of a facility's population subjected to a particular regulation—are fully amenable to analysis under the *Turner* standard. *See, e.g., Covino,* 967 F.2d at 79 (stating that "the nature of [the facility's] inmate population" supported the finding that there was "a legitimate and rational connection between the challenged searches ... and [the facility's] security interests"); *Michenfelder v. Sumner,* 860 F.2d 328, 332-33 (9th Cir. 1988) (noting, while upholding visual body-cavity searches of inmates housed in a facility's maximum security unit each time a prisoner entered or left his cell, that "the searches are conducted on convicted prisoners in [the facility's] most restrictive unit" and "elevated security precautions are justified for prisoners placed in maximum security settings ... "). Indeed, because *Turner* requires that the interest identified by the government be "legitimate" and that there be a nexus between the restriction of a prisoner's constitutional rights and the interest, *see* 482 U.S. at 89-90, facility regulations justified by penological goals applicable only to persons convicted of crimes—such as punishment—could not be imposed on pretrial detainees. In this case, however, the NCCC's as-

serted interest is facility security, which is a legitimate concern regardless of the status of the facility's population. *See Mauro v. Arpaio,* 188 F.3d at 1059 & n.1 (9th Cir. 1999) (*en banc*). n6

> n6 In expressing "doubt" in *dicta* over whether the use in *Turner* of the phrase "penological interests" limits its applicability to "persons convicted of crimes," the panel in *Benjamin v. Fraser,* 2001 U.S. App. LEXIS 19666, No. 00-9093, 2001 WL 1012247 (2d Cir. Sept. 5, 2001), cited Judge Kleinfeld's dissent from the en banc decision in *Mauro.* 188 F.3d 1054, 2001 WL 1012247, at *9 n.10. Judge Kleinfeld, in turn, relied on a narrow definition of "penological" as "relating to the 'theory and practice of prison management and criminal rehabilitation'" and meaning, "roughly," "penalty or punishment." 188 F.3d at 1068. Judge Kleinfeld found support for his belief that the Supreme Court used "penological" in this narrow sense in its recognition in *Turner* that rehabilitation is a legitimate penological interest. *Id.* at 1068 & n.8 (*citing Turner,* 482 U.S. at 97-99). Judge Kleinfeld's analysis, however, fails to account for the reliance in *Turner* of facility security as the "penological interest" justifying aprohibition on inmate correspondence between institutions, *see Turner,* 482 U.S. at 91-92, which reliance is inconsistent with his theory that "penological interests" are interests applicable only to prison ers convicted of crimes—after all, facilities housing prison ers may have legitimate security concerns regardless of whether those prisoners have yet been convicted of a crime. Indeed, the majority opinion in *Mauro,* in which the Ninth Circuit distinguished between penological interests that may be legitimately applied to pretrial detainees from those that may be legitimately applied only tothose convicted of crimes, *see* 188 F.3d at 1059 & n.1, demonstrates the appropriate use of the *Turner* multi-factor framework to a regulation affecting pretrial detainees. *See* 188 F.3d at 1058-63.

Another difficulty with the majority's holding is that it interprets the Constitution as requiring large, complex facilities such as the NCCC to be run less intelligently—

and less safely—than ought to be the case. In deciding whether and under what circumstances to permit cavity searches, responsible correctional officials would presumably balance the rights of prisoners (which are impinged on by cavity searches) and the safety of staff and other prisoners (which is enhanced—at least somewhat—by cavity searches). In determining how this balance should be struck in the context of any particular facility, common sense dictates that a number of factors are relevant, including whether the facility is overcrowded; whether it is equipped with drug-sniffing dogs and metal detectors; whether it has been infiltrated by gangs; and whether prisoners have attempted previously to secrete contraband in a manner detectable only by cavity searches. Because the "reasonably related" standard envisions a flexible, multifactor inquiry, *see Turner,* 482 U.S. at 89-91, it would permit administrators to craft cavity search policies with an eye to each of these concerns.

By contrast, the "reasonable suspicion" standard requires prison administrators to focus on only one set of variables—those related to reasonable suspicion itself. Accordingly, the majority's application of the "reasonable suspicion" standard to jails means that administrators who manage facilities such as the NCCC will not be allowed to take into account any of the factors noted above. That makes no sense and, as I have argued, is not required by the Constitution.

The majority holds that we must assess the constitutionality of the cavity search at issue here under *Weber's* "reasonable suspicion" standard, not *Turner's* "reasonably related" standard. For the reasons stated above, I dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

RAY E. SHAIN, 96 Civ. 3774 (LDW)

Plaintiff,

-against-

JOHN ELLISON,(shield No. 761), individually and as Nassau County Police Officer, JOHN DOE, individually and as an Assistant District Attorney of Nassau County, Joseph Jablonsky, individually and as the Nassau County Sheriff, Richard Roe, individually and as Nassau County Corrections Officers and County of Nassau, a Municipal Corporation,

JUDGMENT

Defendants.
----------X

This action came on for motions before the Court and trial before the Court and a jury, Hon. Leonard D.Wexler presiding, the motions having been decided and the issues having been duly tried, and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED,

1. That defendants' motion for summary judgment seeking dismissal of false arrest, abuse of process and malicious prosecution claim is granted; and

2. Plaintiff's motion for summary judgment seeking to have the strip search policy in effect at the Nassau County Correctional Center declared unconstitutional is granted; and

3. That plaintiff take nothing of defendants other than nominal damages in the amount of $1.00 and that the action is dismissed on the merits.

Dated: At Hauppauge, New York
This 12th day of November, 1999

/s/ Leonard D. Wexler
Clerk of the Court

RAY E. SHAIN, Plaintiff, -against- "JOHN" ELLISON (Shield No. 761), et al., Defendants.

CV 96-3774

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

June 1, 1999, Decided

June 1, 1999, Filed

COUNSEL:
For Plaintiff: ROBERT L. HERBST, ESQ., HERBST & GREENWALD LLP, New York, New York.

For Defendants: PAUL F. MILLUS, ESQ., SNITOW & CUNNINGHAM, LLP, New York, New York.

JUDGES:
LEONARD D. WEXLER, UNITED STATES DISTRICT JUDGE.

OPINION BY:

LEONARD D. WEXLER

OPINION:

MEMORANDUM AND ORDER

WEXLER, District Judge
This is a civil rights case brought by an individual who was arrested by Nassau County Police Officers and there-

after spent a night in the Nassau County Correctional Center ("NCCC"). Plaintiff states that he was the victim of the use of excessive force and that he was subject to an unconstitutional strip search. n1 The excessive force issue is presently pending before the court and is scheduled for trial. The court rules herein on plaintiff's motion for summary judgment regarding the constitutionality of Nassau County's strip search policy.

> n1 Plaintiff's complaint also contained allegations of false arrest, abuse of process and malicious prosecution. These claims have been previously dismissed by prior order of this court.

For the reasons set forth below, the court holds that plaintiff is entitled to summary judgment on the claim that the Nassau County strip search policy, which requires a strip/visual body cavity search of all prisoners remanded to custody of the NCCC, is unconstitutional. While the court is mindful and, indeed, sympathetic, to the legitimate security and safety needs expressed by the Nassau County Sheriff, the court is constrained by clear precedent holding that a blanket strip search policy, such as that practiced by Nassau County, violates the Constitution.

BACKGROUND

I. Plaintiff's Arrest

Plaintiff was arrested by Nassau County police officers responding to a call placed by plaintiff's wife concerning a domestic dispute. While some facts are contested, it is clear that at the time of the call plaintiff and his wife were embroiled in divorce proceedings. Although plaintiff was living in the same house as his wife, an order of protection, which had expired the day before the police were called to the residence, required, *inter alia,* plaintiff

and his wife to occupy separate portions of the home.

Among the police officers responding to the domestic dispute call was defendant police officer Ellison. Because it is unnecessary, for the purposes of this ruling, to discuss the specific facts surrounding Plaintiff's arrest, the court will state here only that plaintiff was arrested and subsequently remanded by a Nassau County District Court Judge to the custody of the Nassau County Sheriff at the NCCC.

II. Plaintiff's Search at the NCCC

Upon arrival at the NCCC plaintiff was subject to that facility's procedures regarding all newly admitted prisoners. There are no questions of material fact regarding the policy for admission of new inmates to the NCCC. The Sheriff of Nassau County was deposed and testified that all individuals entering the NCCC are strip searched. n2 Additionally, the court has been provided with copies of the written procedure and has considered briefs, arguments of counsel and has heard testimony regarding the procedure. The procedure at issue is as follows.

> n2 The court herein uses the term "strip search" interchangeably with "strip/visual body cavity search." Both terms refer to searches involving the removal of all clothes and a visual inspection of body cavities. Neither term refers to a search involving any touching of the person being stripped. The searches discussed in the Second Circuit cases referred to herein appear to have been the same type of search at issue here.

All prisoners remanded to the NCCC are subject to a strip/visual body cavity search. The procedure makes no distinctions based upon the nature of the crime charged or the circumstances surrounding the particular arrest. It matters not whether a newly admitted prisoner has been remanded after a misdemeanor charge or a violent felony or

drug charge. Indeed, while the NCCC is provided with papers indicating the crime with which the inmate has been charged, the officer performing the search has no information regarding the circumstances surrounding the inmate's remand to the NCCC. Nor are officers at the NCCC provided with information indicating whether there is a reasonable suspicion as to whether a particular inmate may be concealing contraband. The provision of such information is immaterial, however, since all inmates are subject to the search.

While plaintiff takes issue with the privacy with which the search is carried out, there is little question as to the actual procedures followed. All prisoners are told to disrobe completely. They are told to run their fingers through their hair. A police officer inspects under the prisoner's arms, behind the prisoner's ears and in the prisoner's mouth. The prisoner is told to squat to facilitate a visual inspection of his buttocks. Male inmates are instructed to lift their genitals for a further visual inspection. At no time during this inspection are the prisoners touched — the body cavity search is strictly visual.

The police officer performing the search of plaintiff testified that the search took approximately one minute. Affidavit testimony attached to defendants' papers indicate that the search takes approximately two minutes. Plaintiff states that the search took approximately fifteen minutes. The court is confident that the actual inspection time lies somewhere in between these three estimates — any factual dispute concerning this issue, however is not material to the present motion.

DISCUSSION

I. Summary Judgment Standards

A motion for summary judgment may not be granted unless the court determines that no genuine issue of mate-

rial fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 57 (2d Cir. 1987). Because there is no factual dispute as to the strip search procedure, this case is properly resolved in the context of a motion for summary judgment. n3

n3 Defendant's brief argued that there was reasonable suspi cion to carry out a strip search of plaintiff based upon the nature of the crime charged and the fact that plaintiff was found carrying a small knife. Defendant's conceded, how ever, that when plaintiff was strip searched at the NCCC, the officers at that facility had no information whatever regard ing the nature of plaintiff's arrest or the crime with which he was charged.

II. The Constitutionality of Strip Searches

Thirteen years before this opinion and eleven years before plaintiff was arrested, the Second Circuit held clearly and unequivocally that the Fourth Amendment precludes prison officials from performing strip searches of arrestees charged with misdemeanor or minor offenses absent a reasonable suspicion that the person being searched is concealing weapons or other contraband. The suspicion can be based upon the crime charged or the circumstances surrounding the particular arrest. *See Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987). Any policy authorizing blanket strip searching of arrestees, without the required reasonable suspicion, is unconstitutional. *Id.* at 802.

Not only did the Second Circuit hold such blanket search policies unconstitutional in 1986, but the court further held that the constitutional right to be free from such

searches was so clearly established, even in 1986, so as to preclude the Sheriff who established the county jail policy from invoking the defense of qualified immunity. *Weber,* 804 F.2d at 803.

The unconstitutionality of a blanket strip search policy was again made clear in 1988 when the Second Circuit decided *Walsh v. Franco,* 849 F.2d 66 (2d Cir. 1988). In *Walsh,* the Second Circuit affirmed the district court's denial of a qualified immunity defense in a case involving the policy of the Chittendon County jail in Vermont. *Walsh* reiterated the holding of *Weber* and held, again, that the Fourth Amendment prohibits a blanket policy calling for strip searches of all misdemeanor or minor offense arrestees admitted to jail.

Relying on the fact that the unconstitutionality of a blanket strip search policy was sufficiently established in *Weber* so as to preclude a qualified immunity defense, the Second Circuit in *Walsh* had no trouble holding again in 1988 that defendants were not entitled to claim qualified immunity. *Walsh,* 849 F.2d at 69-70.

III. The Nassau County Policy

It is against this backdrop of clear appellate authority that this court has been asked to consider the constitutionality of the Nassau County policy of strip searching all individuals remanded to the custody of the Nassau County Correctional Center. While the Nassau County defendants have come forward with much evidence they wish this court to consider with regard to security concerns allegedly particular to the Nassau County facility, they do not deny that the strip searching policy is applied without regard to the circumstances surrounding particular arrests or the crime with which the arrestee has been charged.

In *Weber* and *Walsh,* the Second Circuit made clear that strip searches may be justified only by focusing on the

particular arrest — whether it be the nature the crime charged or the circumstances surrounding the arrest — and not on factors relating to the correctional facility. The Second Circuit has specifically rejected the argument that the mixing of arrestees along with the general jail population justifies a blanket strip search policy. Unwilling to consider generalized security concerns as justification for a blanket policy, the Second Circuit held that "the risk of a misdemeanor arrestee's introducing contraband into the general jail population simply did not warrant a strip search of all arrestees ...." *Walsh,* 849 F.2d at 69. In light of this precedent, this court is precluded from considering the institutional concerns of the NCCC. This precedent further requires that this court find that the Nassau County strip search policy, which exists without the requirement of any suspicion, is unconstitutional.

IV. County Liability

Nassau County may be liable for civil rights violations if the unconstitutional act resulting in plaintiff's injuries is, "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy ...." *Monell v. Dep't of Social Serv.,* 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1979); *Weber,* 804 F.2d at 803; *Scott v. County of Nassau,* 1998 U.S. Dist. LEXIS 19680, 1998 WL 874840 (E.D.N.Y. 1998).

Here, as in *Weber,* there is no question but that the act of the Nassau County Sheriff, in establishing and maintaining policies regarding the searching of individuals at the NCCC, amounts to the official policy of Nassau County. Accordingly, the county may be liable for injuries resulting from the execution of this policy.

V. Qualified Immunity

Defendants seek to invoke the defense of qualified immunity on behalf of the Nassau County Sheriff. As noted above, the Second Circuit held, as early as 1986, that the defense of qualified immunity was not available in cases involving blanket strip search policies. *See Weber,* 804 F.2d at 803. The unconstitutionality of a policy such as that in effect at the NCCC was clearly established at the time of plaintiff's arrest. Officials such as the Sheriff, are held to have "constructive knowledge of established law." *Walsh,* 849 F.2d at 69 (*quoting Salahuddin v. Coughlin,* 781 F.2d 24, 27 (2d Cir. 1986)). Under the circumstances present here, it cannot be established that it was objectively reasonable to believe that a strip search of plaintiff was warranted. Accordingly, the Nassau County Sheriff is not entitled to the defense of qualified immunity.

VI. Institutional Concerns At The NCCC

The court would be remiss if summary judgment were granted and the challenged practice condemned, without setting forth certain facts concerning the NCCC which gave this court great pause in striking down that facility's procedures. Had this court the latitude to consider these concerns, the outcome of this motion may well have been different.

Approximately 1,100 individuals are employed at the NCCC, 950 of whom are corrections officers. The facility houses approximately 1,800 inmates on any given day. These inmates arrive at the NCCC, in their street clothes, from a variety of places throughout Nassau County. Each year, approximately 14,000 inmates are processed for introduction to the NCCC. Upon arrival at the NCCC, the corrections officer has available the history of the inmate's offenses (if any) as well as a notation explaining the reason the inmate is being held and commitment papers noting the remand from a judge.

Inmates at the NCCC are either awaiting trial or have been sentenced. They include those charged and/or convicted of crimes ranging from murder and rape to non-violent offenders. According to defendants, the NCCC also houses members of identifiable gangs.

The court has reviewed defendants' submissions regarding security concerns and notes the difficulty in maintaining a safe facility. According to defendant's submissions (which the court recognizes have not been subject to cross-examination), a random search of inmate files revealed that in the past two years there have been six occasions when an inmate was found to have various weapons during a strip search and eight occasions when the initial strip search revealed concealed drugs. While these numbers are not very high, when compared to the number of inmates coming through the facility, the dangers posed by concealed weapons in a facility such as the NCCC are indeed great.

Corrections officers at the NCCC are concerned not only with protecting themselves and other employees, but with protecting the safety of other inmates. Indeed, a failure to properly protect inmates may well result in the imposition of civil liability.

While the court is clear that the precedent established by *Weber,* and reiterated in *Walsh,* precludes this court from upholding a blanket strip search policy in the absence of reasonable suspicion regarding the arrest, the court notes that the prison facilities at issue in both *Weber* and *Walsh* were undoubtably different, in many important respects, from the facility at issue here. While the court does not profess to have an intimate knowledge of the inner workings of the Monroe County, Rochester jail (at issue in Weber) or the Chittenden County, Vermont jail (at issue in Walsh), or even of the size of those facilities, the court questions whether the institutional concerns present

at the NCCC can be fairly compared to these facilities. In sum, a full consideration of the facts surrounding the NCCC and its particular concerns may have resulted in a finding that a one or two minute strip search conducted in privacy might well be warranted when balanced against the concerns of this particular institution. The court makes no finding as to the proper outcome of this balance. Certainly, it would have been necessary to take additional testimony and have each party present their side of the story. Given the state of the law, however, the court could not properly consider this evidence.

CONCLUSION

The policy of strip searching all misdemeanor and minor offense arrestees remanded to NCCC, without requiring any suspicion that the remanded individual is concealing weapons or other contraband, violates the Fourth Amendment to the United States Constitution. Plaintiff's motion for summary judgment with regard to the strip searching policy in effect at the Nassau County Correctional Center is granted.

SO ORDERED.

s/_____
LEONARD D. WEXLER

UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
June 1, 1999

MITCHELL WAYNE THOMAS, Plaintiff-Appellant-Cross-Appellee, v. LARRY LESLIE, Reno County Sheriff, Defendant-Appellee-Cross-Appellant.

Nos. 97-3346, 97-3361

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

April 21, 1999, Filed

NOTICE:
RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL:
For MITCHELL WAYNE THOMAS, Plaintiff-Appellant: Mitchell Wayne Thomas, Huntsville, TX.

For LARRY LESLIE, Defendant - Appellee: Michael Jilka, Wendell F. Cowan, Jr., Shook, Hardy & Bacon, Overland Park, KS.

JUDGES:
Before PORFILIO, KELLY, and HENRY, Circuit Judges.

OPINION BY:
ROBERT H. HENRY

OPINION:

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

This appeal (No. 97-3346) and cross appeal (No. 97-3361) are taken from decisions granting summary judgment to Sheriff Leslie in No. 97-3346 and to Mr. Thomas in No. 97-3361. They arise from an action filed by Mr. Thomas pursuant to 42 U.S.C. § 1983, in which he claimed his constitutional rights were violated while he was incarcerated at the Reno County Detention Center (RCDC) from December of 1992 through May of 1994. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part and reverse in part.

Mr. Thomas raised three claims in his verified complaint. *See* Thomas App. at 1-6. Judgment on the first claim, alleged denial of access to the courts, has not been ap-

pealed, nor has the denial of declaratory and injunctive relief. For his second claim, Mr. Thomas alleged that the absolute ban on newspapers at the jail violated his First Amendment rights. In his third claim, Mr. Thomas contended that he was denied an hour of exercise per day outside his cell in violation of his Eighth and Fourteenth Amendment rights. Mr. Thomas sought $ 15,000 in compensatory damages. *See id.* at 5. The parties filed cross motions for summary judgment with supporting documentation and affidavits. Sheriff Leslie also filed a Martinez n1 report and a supplemental report.

> n1 *See Martinez v. Aaron,* 570 F.2d 317, 319-20 (10th Cir. 1978) (per curiam) (approving district court's use of report filed by prison officials as administrative record).

Background

Mr. Thomas was incarcerated at the RCDC, after being extradited from a facility in Texas, pending disposition of state charges against him in Kansas. During his stay at the RCDC, he was briefly transferred on several occasions to a mental health center, the state hospital, and the county jail. Following his conviction in Kansas, he was transferred back to Texas.

No. 97-3346

In his complaint, Mr. Thomas claimed the failure to provide him with "one hour of recreation outside [his] cell per day violated his constitutional rights under the 8th & 14th Amendments." Thomas App. at 4. In subsequent pleadings, he alleged that because he was under a doctor's care for stomach pains and depression, "it may certainly be argued that the lack of exercise contributed greatly to

[plaintiff's] medical problems ...." R. Doc. 24, Plaintiff's Response to Defendant's Motion for Summary Judgment, at 13.

In his initial Memorandum and Order, the district court found that there were sometimes delays of over a week between inmate visits to the exercise area in the basement of RCDC, *see* Thomas App. at 48, that Mr. Thomas had access to the day room n2 adjoining his cell for at least seventeen hours daily and was permitted to exercise there, and that RCDC intended to provide each inmate with an opportunity for out-of-cell exercise at least weekly, but was not always able to achieve the goal. *See id.* at 49. The court further found that Mr. Thomas filed a grievance with Sheriff Leslie, who admitted telling Mr. Thomas that the exercise area was not available on a daily basis. *See id.* at 48.

> n2 Apparently the day rooms were used for multiple activities, including eating, watching television, and showering.

The court held that under *Wilson v. Seiter,* 501 U.S. 294, 298-303, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991), the Supreme Court noted that an Eighth Amendment claim has two components—a subjective component (did jail officials act with a sufficiently culpable state of mind, i.e., deliberate indifference?) and an objective one (was the deprivation serious?). *See* Thomas App. at 62; *see also Farmer v. Brennan,* 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) ("In prison-conditions cases that [sufficiently culpable] state of mind is one of 'deliberate indifference' to inmate health or safety") (further citations omitted). The court ruled that because the right to a minimal amount of out-of-cell exercise was clearly established at the time of Mr. Thomas's incarceration, the subjective component requiring deliberate indifference had been satisfied. *See id.* at 62-63. We assume that the district court

recognized that the subjective component of deliberate indifference would be satisfied by a showing that Sheriff Leslie was aware of an exercise requirement, given the policy, and knowingly failed to implement it. *See Allen v. Sakai,* 48 F.3d 1082, 1088 (9th Cir. 1994). "This is not a case where defendants claim that they were unaware of either the circumstances resulting in the alleged deprivation or the likelihood that the deprivation would occur." *Id.*

As to the objective component, the court noted this court's decision in *Housley v. Dodson,* 41 F.3d 597, 599 (10th Cir. 1994), as recognizing that the "failure to provide inmates confined for more than a short period of time with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions." *See* Thomas App. at 63.

Because of the parties' disputes as to the real conditions at the jail (e.g., crowded day rooms, Thomas's length of confinement, unsanitary nature of day room as an exercise area), and any damages Mr. Thomas may have incurred to his physical or mental health, the court found that issues of fact existed as to the conditions of Mr. Thomas's confinement with regard to adequate opportunity for exercise. The court then ordered a supplemental Martinez report, directing Sheriff Leslie to include Mr. Thomas's medical records and to "fully address the factors announced in *Housley* which a district court is to consider when evaluating a claim that a prisoner was denied an adequate opportunity for out-of-cell exercise." *See id.* at 65-66.

Sheriff Leslie filed a supplemental Martinez report, which included an affidavit of the captain of the RCDC, Mr. Thomas's medical records, some of the records (gym logs) of those inmates who had signed up to attend the exercise area, a description of the exercise area and its equipment, a description of the jail (cell and day room fa-

cilities), the inmate rule book, information on the average stay of inmates at the RCDC, a gym request slip indicating Mr. Thomas's refusal to attend an exercise session, and other miscellaneous documents. *See* R. Doc. 44 and Thomas App. at 67-106. Mr. Thomas filed a lengthy and detailed response specifically disputing both factual statements and conclusions presented in the Supplemental Martinez report. *See* Thomas App. at 107-139.

In his second Memorandum and Order, the district court found that the RCDC inmates were given the opportunity for out-of-cell exercise once a week, that the goal was to provide each inmate with an hour of exercise a week, but that the sessions usually lasted only twenty to forty minutes, that the sessions were frequently canceled, and that for approximately six months toward the end of Mr. Thomas's incarceration no opportunity for out-of-cell exercise was provided because of an escape from the exercise room. *See id.* at 141.

The court further found that an inmate wishing to participate in attending the exercise area was required to submit a request form before 7:00 a.m. on the day scheduled for exercise and that Mr. Thomas had submitted only one such request to participate in the exercise sessions (and had refused to go when the time came). The court determined that Mr. Thomas admitted "he did not take advantage of the out-of-cell opportunities that were made available to him." See id. at 141-142. The court also ruled that the exercise sessions lasted at least twenty minutes, and that Mr. Thomas "certainly could have received some benefit from participating on a weekly basis." *See id.* at 142. In granting summary judgment to Sheriff Leslie, the court concluded that because Mr. Thomas had refused to participate in the exercise opportunities made available to him, Mr. Thomas could not "show that his mental or physical health deteriorated because [Sheriff] Leslie failed to pro-

vide additional opportunities for out-of-cell recreation." *See id.* at 143.

Summary Judgment

We review the district court's grant of summary judgment *de novo,* applying the same legal standard used by the district court. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "'When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" *Kaul v. Stephan,* 83 F.3d 1208, 1212 (10th Cir. 1996) (*quoting Wolf v. Prudential Ins. Co. of Am.,* 50 F.3d 793, 796 (10th Cir. 1995)). "The relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Bingaman v. Kansas City Power & Light Co.,* 1 F.3d 976, 980 (10th Cir. 1993) (quotation omitted). "Facts must be identified by reference to affidavits ... or specific exhibits incorporated therein." *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 671 (10th Cir. 1998).

Martinez Reports

We have long permitted use of a court-authorized [Martinez] report by prison officials as part of the determination as to "whether a pro se prisoner's allegations have any factual or legal basis." *See Northington v. Jackson,* 973 F.2d 1518, 1521 (10th Cir. 1992). "On summary judgment, a Martinez report is treated like an affidavit, and the

court is not authorized to accept its fact findings if the prisoner has presented conflicting evidence." *Id.* (further citation omitted). In addition, a plaintiff's complaint may be treated as an affidavit where, as here, it "alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury." *Hall v. Bellmon,* 935 F.2d 1106, 1111 (10th Cir. 1991). However, a court may not resolve material disputed issues of fact by accepting the Martinez report's factual findings when they are in conflict with pleadings or affidavits. *See id.* at 1109. "A bona fide factual dispute exists even when the plaintiff's factual allegations that conflict with the Martinez report are less specific or well-documented than those contained in the report." *Id.*

Here, the district court found that inmates were given the "opportunity to exercise out of their cells once a week." Thomas App. at 141. The Supplemental Martinez Report attached an affidavit of a captain at the RCDC stating that Mr. Thomas "was afforded the opportunity to exercise at least once a week in the Exercise Area between December 11, 1992 to December 3, 1993, if he filled out a Request Slip for that activity." Id. at 80. The district court also found, however, that exercise sessions usually lasted only twenty to forty minutes, and that the sessions were frequently canceled. *See id.* at 141.

On appeal, Mr. Thomas argues that material questions of fact exist with respect to his opportunity for adequate exercise outside of his cell. Mr. Thomas relies on our decision in *Housley,* 41 F.3d at 599 (10th Cir. 1994), for his claim that he was entitled to five hours a week of exercise out of his cell. n3 He contends that Sheriff Leslie's Supplemental Martinez Report, *see* Thomas App. at 67, *et seq.,* was also inadequate because the records supplied, i.e., the gym "logs," were incomplete. Specifically, Mr. Thomas claims that the gym logs, which list the names of

inmates who had signed up for the exercise area, exclude the first seven months of Mr. Thomas's incarceration at RCDC and include a six-month period after he had returned to Texas. *See id.* at 84-106. From this "omission of records," he concludes that "the records themselves raise material issues of fact." Thomas Br. at 12. He argues that had the records been complete as ordered by the district court, "the court would have been fully aware of all the cancellations, and the court's ruling then should have been different and in favor of ... Thomas." *Id.* at 13. He further explained that the gym logs attached to the supplemental Martinez report actually demonstrate that even inmates who did sign up for the exercise period were not necessarily afforded the opportunity because there was an insufficient amount of time available to accommodate all the inmates desiring to participate. He also points out the numerous cancellations of exercise periods and the total lack of exercise opportunity for six months between December of 1992 and June of 1994. *See* Thomas App. at 121-25, 80; 133-37. These material disputed issues of fact undercut the court's finding that Mr. Thomas was provided the opportunity for weekly exercise.

> n3 In *Housley*, 41 F.3d at 599 (10th Cir. 1994), we held that an inmate who claimed he received only thirty minutes of out-of-cell exercise in three months had stated a claim that his constitutional rights were violated. We also held that "the right to some exercise was clearly established at the time of Mr. Housley's confinement," which appears to have been prior to 1993. *See id.* We relied in part on *Bailey v. Shillinger,* 828 F.2d 651, 653 (10th Cir, 1987), in which we had recognized that "some form of regular outdoor exercise is extremely important to the psychological and physical well-being of inmates." We have recently affirmed the principles expressed in *Housley* and *Bailey. See Perkins v. Kansas Dep't of Corrections,* 165 F.3d 803, 810 (10th Cir. 1999); *see also*

Williams v. Greifinger, 97 F.3d 699, 704-705 (2d Cir. 1996) (discussing prisoners' rights to some opportunity for exercise); *Mitchell v. Rice,* 954 F.2d 187, 191 (4th Cir. 1992) (generally prisoner "should be permitted some regular out-of-cell exercise"); *Davenport v. DeRobertis,* 844 F.2d 1310, 1315 (7th Cir. 1988) (recognizing number of decisions hold ing that failure to provide inmates confined for more than a short period with opportunity for at least five hours' weekly exercise outside cell raises serious constitutional questions). Although we have referenced five hours of exercise per week, we have declined to adopt a set weekly total for regular or daily exercise. *See Housley,* 41 F.3d at 599.

The district court erred in accepting the facts as set forth in the Martinez reports, where, as here, Mr. Thomas presented conflicting evidence. *See Northington,* 973 F.2d at 1521. *See also Craig v. Eberly,* 164 F.3d 490, 496 (10th Cir. 1998) (noting factual dispute where inmate alleged he was allowed only two one-hour exercise periods during total confinement and jailors claimed he received one hour per week, weather permitting). Thus, the court's conclusion that Mr. Thomas "could have received some benefit from participating [in the exercise period] on a weekly basis" (*see* Thomas App. at 142) is also flawed, because of the factual dispute as to how much exercise time was really afforded inmates at RCDC.

Accordingly, we vacate the district court's judgment as to the exercise claim and remand the matter for further proceedings.

No. 97-3361

The district court also held that the absolute ban n4 on newspapers violated Mr. Thomas's First Amendment rights. The court granted summary judgment to Mr. Thomas on this claim, awarding nominal damages in the amount of $ 1.00.

n4 There is no factual dispute that newspapers are not permitted at the RCDC. Thomas Appendix at 13.

The district court analyzed the RCDC rule forbidding newspapers under the balancing test set forth in *Turner v. Safley,* 482 U.S. 78, 89-90, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). We have described this analysis as follows:

To determine whether the prison action is "reasonably related to legitimate penological interests," *Turner* erects a balancing test, and it directs lower courts to weigh the following factors. First, the lower court should inquire into whether there is a "valid, rational connection" between the prison action and the "legitimate government interest put forward to justify it." Second, the lower court should determine whether "there are alternative means of exercising the right that remain open to prison inmates." Third, the court should evaluate "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." And finally, the court should look for the presence of "obvious, easy alternatives" to the disputed prison activity. Of course, in conducting this analysis, the Supreme Court advises repeatedly that substantial deference is to be accorded to the prison authorities.

Frazier v. Dubois, 922 F.2d 560, 562 (10th Cir. 1990) (internal citations and footnote omitted).

Sheriff Leslie argued that the ban on newspapers was rationally related to concerns that newspapers could be used to start fires n5 or as weapons and that the accumulation of papers constituted a health hazard. The sheriff admitted that inmates were permitted a soft-back Bible and

that they "have access to puzzle books and paperback books via the commissary." Thomas App. at 13. As to the first *Turner* factor, the court determined that because other materials presenting the same security and safety concerns were not restricted, the newspaper ban was not rationally related to the sheriff's stated objective. n6 *Id.* at 57.

> n5 In his initial Martinez report, the sheriff acknowledged that RCDC "is smoke-free and matches and lighters were not permitted." Thomas App. at 15.
>
> n6 No argument was advanced that the content of the news papers posed a security risk. *See Thornburgh v. Abbott,* 490 U.S. 401, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989) (up holding regulations allowing exclusion of certain publica tions found on individualized basis to be potentially detri mental to order and security).

Sheriff Leslie also claimed that access to television, which included local and cable news channels, constituted an alternate means of exercising the right to remain informed about community and national news. He cites no authority for this proposition, nor did he dispute Mr. Thomas's claim (also repeated in an affidavit) that because a majority vote of the inmates in each cell governs what programs are in fact watched, Mr. Thomas was not able to view the news programs he wanted to.

The court found that the alternative means test would allow Sheriff Leslie to prohibit all reading material under the theory that television provides an adequate substitute for all written communications and that this second Turner factor also weighed against upholding the rule. *See id.* at 58.

The court found that as to the third *Turner* factor, the impact of accommodating the right, any such impact of al-

lowing newspapers would be minimal in view of the permitted access to paperback and puzzle books and soft back Bibles. *See id.*

Finally the court determined that an obvious and easy alternative existed to the sheriff's expressed concerns underlying the rule and was thus evidence that the rule was not reasonable but rather an "'exaggerated response' to prison concerns." *See Turner,* 482 U.S. at 90. The alternative identified by the district court was a policy approved for use at another county jail which required inmates to turn in one publication before receiving another, thus reducing the amount of combustible material in the jail. *See* Thomas App. at 58-59. Concluding that the blanket prohibition on newspapers violated Mr. Thomas's First Amendment rights, the court granted him summary judgment on this claim and awarded nominal damages of $ 1.00.

On appeal, Sheriff Leslie claims that the district court failed to properly balance the newspaper ban as a proper penological interest against Mr. Thomas's right to read newspapers. *See Turner,* 482 U.S. at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). The sheriff also contends that he is entitled to qualified immunity on this claim because the right to access newspapers was not clearly established.

Qualified Immunity

Once a defendant claims he is qualifiedly immune, the burden is on the plaintiff to establish both that defendant's actions violated a constitutional or statutory right and that the right allegedly violated was clearly established at the time of the conduct at issue. *See Albright v. Rodriquez,* 51 F.3d 1531, 1534 (10th Cir. 1995). In order to be clearly

established, "'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 1535 (*quoting Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)). Generally, for a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Trigalet v. Young,* 54 F.3d 645, 648 (10th Cir. 1995) (further quotation omitted). However, this test is not rigid, and a plaintiff is not required to cite a factually identical case to demonstrate that the law was clearly established. *See Baptiste v. J.C. Penney Co.,* 147 F.3d 1252, 1257-58 n.9 (10th Cir. 1998), *citing Clanton v. Cooper,* 129 F.3d 1147, 1156 (10th Cir. 1997). Instead we have adopted the approach of "requiring some but not precise factual correspondence in demanding that officials apply general, well-developed legal principles ...." *Clanton,* 129 F.3d at 1157 (*quoting Lawmaster v. Ward,* 125 F.3d 1341, 1351 (10th Cir. 1997)). Accordingly, we must ascertain whether as of December of 1992 it was clearly established that a blanket prohibition of newspapers was unconstitutional. *See Trigalet,* 54 F.3d at 648.

Right to Read Newspapers

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974). *See also Bell v. Wolfish,* 441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979) ("our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments"); *Kleindienst v. Mandel,* 408 U.S. 753, 762,

33 L. Ed. 2d 683, 92 S. Ct. 2576 (1972) ("The Constitution protects the rights to receive information and ideas.") (further citations omitted).

Although neither the Supreme Court nor this court have specifically held that a prisoner is entitled to read newspapers, other courts have addressed the issue. *See, e.g., Van Cleave v. United States,* 854 F.2d 82, 84 (5th Cir. 1988) (plaintiff stated claim for relief where complaint alleged his request for newspaper denied); *Green v. Ferrell,* 801 F.2d 765, 772 (5th Cir. 1986) (jail's prohibition on newspapers violates First Amendment); *Mann v. Smith,* 796 F.2d 79, 82 (5th Cir. 1986) (ban on newspapers and magazines represents exaggerated response to legitimate need to preserve discipline and maintain security); *Sizemore v. Williford,* 829 F.2d 608, 610 (7th Cir. 1987) (absent restrictions based on legitimate goals of confinement, prison inmates retain First Amendment right to receive and read newspapers); *Kincaid v. Rusk,* 670 F.2d 737, 744 (7th Cir. 1982) (total ban on newspapers unjustifiable when hazards of newspaper possession could as well be caused by reading material detainees were permitted to have).

A number of district courts have also recognized prisoners' rights to read newspapers. *See, e.g., Parnell v. Waldrep, 511* F. Supp. 764, 767-68 (W.D.N.C. 1981) (refusal to allow jail inmates to receive newspapers is unconstitutional); Hutchings v. Corum, 501 F. Supp. 1276, 1299 (W.D. Mo. 1980) (absolute denial of access to newspapers violates inmates' First Amendment guarantees); *Mitchell v. Untreiner,* 421 F. Supp. 886, 895 (N.D. Fla. 1976) (failure to permit inmates to read daily newspaper denied First Amendment freedom of speech, association, and right to be informed citizens in democratic society); *Payne v. Whitmore,* 325 F. Supp. 1191, 1193 (N.D. Cal. 1971) (that right to receive newspapers and magazines is part of First

Amendment is beyond question).

We agree with the district court that the absolute ban on newspapers does not constitute a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forth to justify it," *Turner,* 482 U.S. at 89 (further quotation omitted), particularly where the hazards concerning Sheriff Leslie could as well be caused by the permitted reading materials. *See Kincaid,* 670 F.2d at 744; *Mann,* 796 F.2d at 82 (because jail has no smoking rule and inmates are permitted to have other forms of paper, official rationale for banning newspapers seems tenuous at best).

Nor are we persuaded by Sheriff Leslie's argument that access to television provides an adequate alternative to newspapers. Television cannot supply the depth and diversity of coverage that newspapers can provide. Mr. Barnett's affidavit] states he was unable to watch news programs because of the majority vote rule controlling what programs were watched. Sheriff Leslie has not disputed this statement. Moreover,

> it is not up to the [county sheriff] or this court to decide that television can adequately service the first amendment right to receive protected materials. Rather, we must apply the principle that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.

See Mann, 796 F.2d at 83 (footnote and citation omitted).

We therefore conclude that the contours of an inmate's right to access to newspapers was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Anderson,* 483 U.S. at

640; *cf. Housley,* 41 F.3d at 600 ("[a] reasonable sheriff and jailer must remain apprized of major constitutional developments concerning inmates' rights."). The district court correctly held that Sheriff Leslie was not entitled to qualified immunity on this claim, and judgment as to this claim is affirmed.

Accordingly, in appeal No. 97-3346, the district court's judgment is REVERSED, and the matter is REMANDED for further proceedings. In appeal No. 97-3361, the district court's judgment is AFFIRMED. The mandates shall issue forthwith.

Entered for the Court

Robert H. Henry

Circuit Judge

ROBERT L. POLK, Plaintiff-Appellant, v. RICKY PARNELL, Head Jailer; HAROLD GARRISON, Fulton County Judge Executive; FULTON COUNTY FISCAL COURT; CITY OF HICKMAN, Defendants-Appellees.

No. 96-5711

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

December 8, 1997, Filed

NOTICE:
[*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

ROBERT L. POLK, Plaintiff - Appellant, Pro se, Eddyville, KY.

For RICKY PARNELL, HAROLD GARRISON, Defendants - Appellees: W. Kenneth Nevitt, R. Thaddeus Keal,

Sun S. Choy, Williams & Wagoner, Louisville, KY.

JUDGES:

Before: MERRITT, BATCHELDER, and FARRIS, * Circuit Judges.

* The Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION:

ORDER

Robert L. Polk appeals a district court order granting summary judgment for the defendants in his civil rights action filed pursuant to 42 U.S.C. § 1983. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Polk sued the jailer of the Fulton County (Kentucky) Jail, the Fulton County Judge Executive, the Fulton County Fiscal Court, and the City of Hickman. Polk sued the jailer and the judge executive in their individual capacities, as well as suing the jailer in his official capacity. Polk alleged that the defendants: 1) subjected him to numerous conditions of confinement that violated the Eighth Amendment; 2) were deliberately indifferent to his serious medical needs; 3) improperly placed him in security lock down; 4) improperly restricted his visitation and religion privileges; 5) discriminated against him because of his race; and 6) attempted to entrap him into committing a crime. The district court concluded that Polk's allegations were without merit and granted summary judgment for the defendants. Polk has filed a timely appeal.

We initially note that in this appeal Polk argues only that the defendants: 1) subjected him to conditions of confinement violating his Eighth Amendment rights by confining him in an overcrowded cell, providing insufficient razors for shaving, and providing only plastic utensils for eating; 2) were deliberately indifferent to his back, foot, and stomach problems; 3) improperly placed him in security lock down; and 4) improperly restricted his visitation and religion privileges. Consequently, Polk's remaining claims are considered abandoned and not reviewable. *Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991), *cert. denied*, 503 U.S. 939, 117 L. Ed. 2d 624, 112 S. Ct. 1481 (1992).

Upon review, we conclude that the district court properly granted summary judgment for the defendants. This court renders de novo review of a district court order granting summary judgment. *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Id. The moving party must show an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met this burden, the non-moving party must designate specific facts showing that a genuine issue exists for trial. *Id.* at 324.

The district court properly granted summary judgment on Polk's claims that the defendants subjected him to unconstitutional conditions of confinement because his allegations fail even to state a claim. During his incarceration at the Fulton County Jail, Polk was a pretrial detainee. The Eighth Amendment's protection against cruel and unusual punishment extends to pretrial detainees through the Fourteenth Amendment's Due Process Clause, *see Whit-*

ley v. Albers, 475 U.S. 312, 327, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986), and thus claims by pretrial detainees challenging conditions of confinement are analyzed under the Eighth Amendment. *See Thompson v. County of Medina,* 29 F.3d 238, 242 (6th Cir. 1994). To establish a violation of the Eighth Amendment, the offending conduct must reflect an unnecessary and wanton infliction of pain. *Whitley,* 475 U.S. at 319. A viable Eighth Amendment claim has an objective and subjective component. *Farmer v. Brennan,* 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994). The objective component requires that the pain be serious, *Hudson v. McMillian,* 503 U.S. 1, 8-9, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992), and the subjective component requires that the defendant act with deliberate indifference to an inmate's health or safety. *Wilson v. Seiter,* 501 U.S. 294, 302-03, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991). Polk's allegations that the defendants improperly confined him in an overcrowded cell, provided insufficient razors for shaving, and provided only plastic utensils for eating fail even to state a claim for an Eighth Amendment violation.

Polk's allegation that he was not provided with prescribed medications for his back, foot, and stomach conditions is also meritless. While Polk has submitted medical forms indicating that he was prescribed these medications, he has not alleged that the individual defendants were responsible for withholding the prescriptions. His claim appears to rely on the doctrine of respondeat superior and this doctrine is not applicable in a § 1983 action. *Taylor v. Michigan Dep't of Corrections,* 69 F.3d 76, 80-81 (6th Cir. 1995).

Polk's allegation that the defendants improperly placed him in lock down also fails to state a claim. Polk argues that

the defendants improperly placed him in lock down for four days. However, Polk's short stay in disciplinary segregation was not such an atypical and significant hardship as to create a liberty interest requiring due process. *See Sandin v. Conner,* 515 U.S. 472, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418 (1995). Further, the defendants' restrictions on Polk's religion and visitation privileges were reasonably related to legitimate penological interests. *Turner v. Safley,* 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

Accordingly, this court affirms the district court's judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

Supreme Court, U.S.
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NO. 02-541

IN THE
SUPREME COURT OF THE UNITED STATES

THE COUNTY OF NASSAU, a Municipal Corporation; JOSEPH JABLONSKY,

Petitioners,

-against.-

RAY E. SHAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae City
of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1030 or 788-1067

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JULIAN L. KALKSTEIN,
of Counsel.

*Counsel of Record

October 24, 2002

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PRELIMINARY STATEMENT

The City of New York ("the City") submits this brief in support of the petition for a writ of certiorari in this matter.

INTEREST OF THE AMICUS CURIAE

(1)

Confronting the United States Court of Appeals for the Second Circuit in Shain v. Ellison, 273 F.3d 56 (2d. Cir. 2001), was the constitutionality of Nassau County (New York) Correctional Center's policy (NCCC) of subjecting all misdemeanor and minor offense post-arraignment arrestees remanded to the NCCC to a visual body cavity strip search absent reasonable suspicion that the remanded individuals were concealing contraband. The Court of Appeals for the Second Circuit held that the United States Constitution, Amend. IV, precludes prison officials from performing a strip/body visual cavity search of an arrestee charged with misdemeanors or other minor offenses unless they have a reasonable suspicion that the arrestee is concealing weapons, drugs or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest. The Second Circuit rejected the argument that although the strip search

policy impinges on an inmate's constitutional right, the propriety of the regulation should be upheld because it is "reasonably related" to such legitimate penological interests as the safety of the institution staff and other prisoners. See, Turner v. Safley, 482 U.S. 78, 89-90 (1987).

To reach its determination, the Second Circuit held that the "reasonably related" standard is controlling where the relevant correctional institution is a "[a] state or federal facility of confinement for convicted criminals, especially felons, as opposed to a jail, a correction facility that houses persons convicted of minor crimes and pre-trial detainees. In the City's view, this distinction ignores this Court's trenchant observation that that "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates" Bell v. Wolfish, 441 U.S. 520, 547 n 20 (1979). These detainees may have serious prior records. Id.

The City has a significant interest in this Court granting the petition for certiorari in this matter because the

Shain decision effectively usurps the legitimate authority of prison experts in New York City, as it did to those authorities in Nassau County, to implement the security precautions they consider necessary for the effective and safe operations of its institutions. The Circuit Court's decision turns on an artificial distinction, jail versus prison, that bears little relation to reality of running a penal system in a city the size of New York. The myriad safety and security issues of a penal system the size of New York City's is and would continue to be seriously compromised by a decision that takes little account of its inherent dangers.

(2)

The Department of Corrections for the City of New York maintains ten facilities on Rikers Island, three of which are responsible for the initial processing of inmates. Administration of facility this size is a task of "monumental proportions." Cf,. Block v. Rutherford, 468 U.S. 576, 583

(1984). Many of the misdemeanor new admissions are misdemeanor and felony recidivists.

In 1998, there were 183,851 non-felony arrests in the City of New York. In 1999, there were 191,999 non-felony arrests. As a result, in calendar year 1999, the average number of daily new admissions was 332. On April 28, 2000, there were 12,981 detainees in Rikers Island. The number is comprised of inmates with pending criminal charges, newly sentenced inmates who are awaiting transfer to the NYS Department of Correctional Service, parole violators and State contract inmates. Of this population, 2847 were in custody on non-felony matters. Of that group, 2241 had been in custody previously for a felony matter.

Each inmate's housing assignment was based on a classification assignment that includes age and a risk assessment including criminal history and security risk group affiliation such as gang members and the severity of the current charge. In addition, there was special, subset housing units within each of the main categories for gay,

mental observation, protective custody, enhanced restraints, administrative and punitive segregation.

There is no separate housing based on the class of criminal charge for which the inmate has been arrested. This fact allows commingling and interactions between inmates of all criminal backgrounds.

Over the past five years, the Department of Corrections has developed an aggressive search operation. In fiscal year 1996, the Department stepped up its search operations and conducted 105,100 searches that recovered 8006 weapons while in fiscal year 1997, 158,875 searches recovered 9329 weapons. In fiscal year 1998, 182,760 searches were conducted resulting in a recovery of 6812 weapons. In fiscal 1999, 252,404 searches recovered 5122 weapons. In other words, searching for weapons and other contraband within the institutions of Riker's Island is essential to the maintenance of security and safety of both institution staff and prisoners.

A modification of the Department's strip search policy exempting misdemeanor detainees will compromise the Department's efforts to maintain security in its facilities. Not only will the Department be prevented from conducting a visual body search, but it will not be permitted from conducting a manual search of clothing that is needed for security because detainees are permitted to wear the same clothing as a member of the public would wear. Part of a strip search procedure includes a manual inspection of seams, hems and waistbands of new admissions.

Strip searches are performed to prevent contraband from entering and remaining in the correctional facility and for the safety of the institutional personnel. The holding in Shain is premised on the questionable notion that the likelihood of a misdemeanor arrestee bringing into or maintaining contraband in a penal institution can be determined by the crime charged. This notion is further undermined by the fact that the Shain holding would

encourage those who are desirous of smuggling weapons, drugs and other contraband into a penal institution to induce persons through reward or coercion to be arrested for misdemeanors with such material secreted on their person knowing that the arrestee would not be subject to a visual cavity strip search.

As we discuss above, the jail/prison division ignores the arrestee's past criminal history, age and other background information. Shain is premised on an unsupported distinction between a jail and a prison, a concept that has no bearing on running a complex penal institutions in a metropolitan area such as New York City. It marks an inappropriate usurpation of security measures implemented by prison administration experts that requires reversal.

SUMMARY OF THE ARGUMENT

In this matter, the Court of Appeals for the Second Circuit determined that the United States Constitution, Amend. IV, required prison officials to find "reasonable

suspicion" that an arrestee charged with a misdemeanor carried a weapon or contraband before performing strip/body visual cavity search.

However, this Court has held that "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner, supra, 482 U.S. 78, 89-90 (1987). In Washington v. Harper, 494 U.S. 210, 223-224 (1990), this Court explained that the Turner standard of review was based upon the need to reconcile its longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. "These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution." Id

This Court should grant the petition in order to resolve the conflict as to what standard should be applied to determine the propriety of body cavity searches of post-arraignment detainees. Not only is there an apparent

conflict as to what standard is to be applied between the Second Circuit and this Court, but there is a conflict as to what standard is to be applied among other Circuit Courts.

The issue at bar derives additional importance from the fact that the Second Circuit's approach represents a substantial intrusion into the administration of such large penal institutions as those found in New York City and Nassau County. Significantly, in reaching its determination, the Court of Appeals for the Second Circuit effectively bypassed this Court's admonition that courts should play a very limited role in the administration of detention facilities with regard to such issues as safety and security.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION SO THAT IT MAY RESOLVE THE ISSUE OF WHETHER A STRIP SEARCH POLICY OF POST ARRAIGNMENT MISDEMEANOR ARRESTEES THAT EFFECTIVELY DISCOVERS AND DETERS THE INTRODUCTION OF CONTRABAND INTO PRISONS, THEREBY ENSURING THE SAFETY AND SECURITY OF THE INSTITUTION STAFF AND OTHER PRISONERS, .IS CONSTITUTIONALLY REASONABLE.

(1)

The issue presented by the petition in this matter is what is the proper test to be applied in determining whether the United States Constitution, Amend. IV, precludes prison officials from performing a strip/body visual cavity search of an arrestee charged with misdemeanor.

The Court of Appeals for the Second Circuit, when confronted with this issue, claimed that it was bound to follow its holding in Walsh v. Franco, 849 F.2d 66 (2d Cir. 1988) and Weber v. Dell, 804 F.2d 796 (2d Cir. 1986). Shain, supra, 273 F.3d at 56. Those cases stand for the proposition that prison officials may not conduct strip

searches with visual cavity inspections of arrestees charged with misdemeanor or minor offenses absent a "reasonable suspicion" that the arrestee is concealing contraband. This suspicion may be based on the crime charged, the particular characteristics of the arrestee or the circumstances of the arrest. Walsh, supra, 849 F.2d at 68-69.

However, a year after Weber, this Court held that "when a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89-90 (1987). Enlarging on this principle in Washington v. Harper, 494 U.S. 210, 223-224 (1990), this Court stated that the Turner standard of review was based upon the need to reconcile its longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult judgments concerning institutional operations. "These two principles apply in all cases in

which a prisoner asserts that a prison regulation violates the Constitution." Id.

This Court should resolve the issue of whether the Turner reasonably related standard should be applied to the question of the legal propriety of the cavity search of a post-arraignment detainee. The holding in Shain marks a profound intrusion into the administration of such large penal institutions as those found in New York City and Nassau County. Significantly, in reaching its determination, the Court of Appeals for the Second Circuit essentially ignored this Court's admonition that courts should play a very limited role in the administration of detention facilities. Block, supra, citing, Bell v. Wolfish, 441 U.S. 520, 539 (1979). The Circuit Court's decision compels prison administrators to focus on one set of variables, those related to reasonable suspicion. The multi-factor approach of Turner permits administrators to consider the necessity of cavity searches in the context of how to maintain safety and security in the context of the particular facility.

(2)

Walsh and Weber, unlike the case at bar, involved aresstees confined in pre-arraignment detention. Those searches were conducted prior to a judicial determination that probable cause justified Walsh and Weber's extended incarceration. Those plaintiffs not only retained the privilege and expectation of parole but both plaintiffs were, in fact, released at the police processing stage of the action. Walsh, supra, 849 F.2d at 67; Weber, supra, 804 F.2d at 799. In contrast, the search challenged in the case at bar, was conducted after plaintiff was remanded to the custody of the Nassau County Department of Correction by the District Court after arraignment.

In addition, the challenged search was conducted only when plaintiff was admitted into the general jail population. On this point, it is important to note that a significant factor repeatedly considered by other Circuit Courts in determining the constitutionality of strip searches was whether the search was conducted on a detainee who

was simply awaiting bail or a pre-trial detainee who was admitted or who was about to be admitted into the general jail population. See e.g., Hause v. Vaught, 993 F.2d 1079, 1082 (4th Cir. 1993), cert. den., 510 U.S. 1049 (1994); Fuller v. M.G. Jewelry, 950 F.2d 1437, 1448 (9th Cir. 1990); Dobrowolskj v. Jefferson Co., 823 F.2d 955, 958 (6th Cir. 1987).

The Second Circuit "sidesteps" these difficulties by holding that the "reasonably related" standard is controlling where the relevant correction facility is a prison and the "reasonable suspicion" standard is controlling where the relevant correctional facility is a jail. Shain, supra, 273 F.2d at 71 (Cabranes, dissenting). As to this distinction, the majority in Shain points to no cases that differentiate between jails and prisons in the manner they suggest. Indeed, Judge Robert Katzman in his concurrence, while feeling constrained by precedent to join in the majority, acknowledged that that "this Circuit's choice to distinguish either between misdemeanors and and felonies or between

jails and prisons is not necessarily persuasive to me." .Shain, supra, 273 F.2d at 70.

Significantly, Judge Cabranes noted in his dissent in Shain that "our sister Circuits routinely apply *Turner's* 'reasonably related' standard to cases involving jails" and cites several cases to support his assertion. Id. On this basis, Judge Cabranes concludes that the majority's decision creates a Circuit split "that calls out for resolution by the Supreme Court." Id. at 70.

(3)

This Court explained in Turner that

> Running a prison is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of power concerns counsel a policy of judicial restraint. where a state penal system is involved, federal courts have . . . additional reasons to accord deference to the appropriate authorities. 482 U.S. at 84-85.

Amplifying on this principle, this Court in Washington, supra, 494 U.S. at 223-224, explained that that "reasonably related" standard was adopted "based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration (citation omitted). . . We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." This Court clearly sought to give deference to prison administrators so as to allow them to "adopt innovative solutions to the intractable problems of prison administration. . . ". Turner, supra, 482 U.S. at 79. In addition, as explained by this Court, a stricter standard would "inevitably" make courts "the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetrat[ing] the involvement of the federal courts in affairs of prison administration. (citation omitted).'". Id.

In sum, the holding of Shain marks a serious conflict with the holdings of this Court and other Circuit Courts in an area of significant penal institution administration. To reach its holding, the Second Circuit has resorted to unrealistic differentiating of jails and prisons in an attempt to evade to import of the principles of Block and Turner. This radical result endangers both corrections officials and prisoners. This Court should accept this case to resolve this significant and pressing problem.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Amicus Curiae
City of New York.

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JULIAN L. KALKSTEIN,
of Counsel.

*Counsel of Record

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IN THE

Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

-v-

RAY E. SHAIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COUNTY OF ORANGE, STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

CATHERINE M. BARTLETT
County Attorney
County of Orange
255 Main Street
Goshen, NY 10924
(845) 291-3150

CATHERINE M. BARTLETT
RICHARD B. GOLDEN *
CHRISTINA M. SANABRIA
Of Counsel

* *Counsel of Record*

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BRIEF FOR THE COUNTY OF ORANGE, STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI IN THE CASE OF SHAIN v. ELLISON, 273 F.3d 56 (2d CIR. N.Y., 2001)

CONSTITUTIONAL PROVISION INVOLVED:

This case involves the following constitutional provision:

U.S. Const. Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTEREST OF THE COUNTY OF ORANGE, STATE OF NEW YORK AS AMICI:

The County of Orange, State of New York is a municipality with a population of approximately 341,000, located approximately sixty (60) miles north and west of New York City. In the past, this County was primarily rural in character with farms and small villages located within its borders, which run from the western shore of the Hudson River, to the eastern shore of the Delaware River. In recent years, as a result of its increasing population, the County of Orange has begun to suffer "growing pains", including an increase in violent crime, as well as an increase in gang related criminal activity.

As is the case in most counties in the State of New York, the County, through the elected office of Sheriff operates a correc-

tional facility. The Orange County Correctional Facility (hereinafter referred to as the "OCCF") has a maximum inmate capacity of 616 inmates, with an average daily census of approximately 530 inmates. The OCCF houses all types of inmates: pre and post arraignment; sentenced and unsentenced; felons, misdemeanants and those individuals charged with lesser offenses. Most of the towns and villages within the County have no detention or holding facilities of their own, and as such, all post-arraignment detainees are remanded to the custody of the OCCF by local magistrates and judges. Individuals arrested by the New York State Police within the County of Orange are also held at the OCCF, both pre and post arraignment.

In January of 2001, the OCCF staff undertook a complete review of the OCCF's strip search procedure for pre-trial detainees (as opposed to sentenced inmates) with the assistance of the Orange County Attorney's office. "Pre-trial detainee" pertains only to those prisoners who are held in custody at the OCCF, pursuant to a securing order from a court committing an individual to the custody of the Orange County Sheriff, pending release on bail/bond or further appearance before a Superior Court. The aforementioned review consisted of an examination of the regulations of the New York State Commission of Correction, (the New York State agency charged with the oversight of the OCCF), as well as reported decisions from the United States District Court for the Southern District of New York, the Second Circuit Court of Appeals and this Court. The Orange County Attorney's Office worked with OCCF personnel in reviewing the procedures that existed; as well as the development and adoption of new procedures that were intended to be in compliance with the requirements of both the state regulatory agency and the Federal Courts. This review of the OCCF's strip search procedures was occasioned by a number of factors including a District Court lawsuit, which

brought to light issues regarding the strip search procedures followed by OCCF personnel, as well as the impending move of the OCCF's operations to an entirely new facility.

As a result of the aforementioned review, the Orange County Sheriff's Office adopted a comprehensive Inmate Search Policy, which was distributed to all Command Staff on August 1, 2001 and subsequently to substantially all OCCF staff during the first week of August 2001. This Inmate Search Policy was formally adopted by Sheriff H. Frank Bigger on August 20, 2001, but had been in practice since early August of 2001.

This Inmate Search Policy Section 5.3.1stated in pertinent part that a strip search may be conducted under the following circumstances:

a. Committed sentenced inmate/weekenders;
b. Committed probation/parole violator;
c. Weapons or narcotics offenses;
d. Known gang affiliation;
e. Prior or current escape charges;
f. Committed for a felony;
g. Prior or current contraband charges;
h. Known history of contraband charges;
i. Metal detector/B.O.S.S. (Body Orifice Scanning System) chair activation;
j. Inmate that appears under the influence of drugs/alcohol;
k. Currently suicidal inmate;
l. Prior suicidal history in past 10 years;.....
r. Reasonable suspicion....

The Inmate Search Policy then stated how such a search was to be conducted, i.e., by an officer of the same sex; in private; without physical touching of the inmate, etc.

Prior to the implementation of the aforementioned Inmate Search policy, the OCCF would conduct personal hygiene examinations of inmates' persons upon their admission to the OCCF. These personal hygiene examinations consisted of visual inspections of the inmates' bodies during the time they were changing from their street clothes into their OCCF-issued jumpsuits. If the corrections' officer conducting the examination had a reasonable suspicion that the inmate was secreting drugs, weapons or other contraband on his/her person, a strip search would be initiated. Again, the strip searches conducted involved no touching of the inmate by corrections personnel, were done in private, were brief and performed by officers of the same sex as the involved inmates.

In November of 2001, the New York State Commission of Correction conducted its annual evaluation of the OCCF. In January of 2002, the OCCF received the report from the State Commission of Correction regarding its November 2001 evaluation. Significantly, the OCCF's Admissions' policies and procedures were reviewed and found to be in full compliance with State standards. The only criticism of the OCCF's search policy by the Commission of Correction was that the Jail staff cease completing strip search forms with respect to visitation searches. Significantly, at no time in any of the previous State Commission of Correction's annual evaluations performed during the years 1999-2000, was the OCCF ever cited for its then existing policy of inmate body searches/personal hygiene examinations.

At the present time, pending before the United States District Court in the Southern District of New York is a class action lawsuit entitled, *Dodge v. County of Orange, et. ano.*, 02 Civ. 769 (U.S.D.C., S.D.N.Y.), wherein Plaintiffs allege that the County of Orange and its Sheriff, H. Frank Bigger created, implemented and maintained a blanket illegal policy of strip

searching all pre-trial detainees admitted to the OCCF from January 31, 1999 through July 26, 2002.

Plaintiffs commenced this action in and about February of 2002 against the County of Orange and the Sheriff of Orange County (hereinafter referred to as the County Defendants). Prior to the joinder of issue therein, Plaintiffs moved for class certification and for a preliminary injunction. In a decision, dated May 31, 2002, the District Court ordered that a hearing be held on the issue of whether injunctive relief was warranted.

This hearing took place on June 24, 2002. The County Defendants contended at the time of the hearing before the District Court that their August, 2001 Inmate Search policy comported with the prevailing Federal and State case law precedents, as well as all state and Federal mandates regarding searches conducted of pre-trial detainees upon their admission to a correctional facility. All personnel with the authority to conduct pre-trial detainee strip searches did so pursuant to the aforementioned Inmate Search policy and with the limitations prescribed by both State regulatory agencies and Federal court decisions.

The District Court, in a decision dated July 24, 2002 enjoined the County Defendants from utilizing the Inmate Search Policy, first implemented in August of 2001. Essentially the District Court Judge ruled that the OCCF was enjoined from strip searching a pre-trial detainee held for a misdemeanor or lesser offense based solely on the existence of one of the factors listed in the subject Inmate Search Policy. For example, the District Court held that corrections officers could not strip search a detainee solely as a result of a positive metal detector reading; or solely on the basis that the detainee appeared to be under the influence of drugs or alcohol; or solely on the basis that the detainee is held on a parole or probation violation. In fact, a

strict interpretation of the District Court's decision would not permit the strip search of any individual charged with a felony. The County Defendants were essentially ordered to only strip search a detainee when a corrections officer had *individualized* reasonable suspicion to conduct such a search. In the words of the District Court, "[OCCF officers] may – indeed, they must – evaluate the crime charged, the circumstances of the arrest, and the detainee's characteristics, including the factors listed in Section 5.3.1." The District Court Judge further noted that the OCCF would not be "unduly burdened" by changing its strip search policy to conform to her ruling.

The District Court judge specifically based her decision on the case law precedents established by the United States Court of Appeals for the Second Circuit in the cases of *Weber v. Dell*, 804 F.2d 796 (2nd Cir. N.Y.,1986) and *Shain v. Ellison*, 273 F.3d 56 (2nd Cir. N.Y., 2001).

Subsequent to the District Court's ruling, an amended strip search policy and post orders were issued to the Booking and Receiving unit of the OCCF so to conform to the preliminary injunction. Since that time, OCCF personnel have substantially conformed to the District Court's injunction.

On July 31, 2002, an article about the District Court's issuance of the injunction appeared in the New York Law Journal. Later that same week, another article about the injunction appeared in the Times-Herald Record, a local newspaper that provides news coverage of events that affect both Orange and Sullivan Counties.

Since the issuance of the District Court's injunction and the appearance of articles in various newspapers regarding same, there has been a significant increase in the amount of contraband seized post admission at the OCCF, as established by the

number of State Reportable Incidents (S.R.I.'s) of contraband. The State Commission of Correction requires reporting of any incidents of contraband seizures when the contraband discovered originates from outside the confines of the particular correctional facility. In addition to S.R.I.'s, the OCCF staff also report any incidents of contraband discovered within the Facility, whether the contraband was introduced from the outside or whether the contraband was from within the Jail itself, i.e. batteries, medications, and excess issue items such as toilet paper, pens, clothing, etc.

A review of relevant OCCF records reveal the following: for the year 1999, there were five S.R.I.'s of contraband at the OCCF; for the year 2000, there were five S.R.I.'s of contraband, with one S.R.I. encompassing multiple drug seizures that were the result of an undercover operation at the Facility; and in the year 2001, there was one S.R.I. of contraband. For the months of January through July of 2002, there were four S.R.I.'s of contraband.

As previously indicated, the District Court's injunction was issued on or about July 24, 2002, with the aforementioned newspaper articles appearing within a week of the Court's order. For the month of August of 2002, there were six S.R.I.'s of contraband, a more than 100% increase over the previous seven months. A review of these August S.R.I.'s reveals additional information as to the detrimental effects of the District Court's injunction. Of the six S.R.I.'s of contraband, three of the involved inmates had been admitted to the Jail on misdemeanor charges, with two of the inmates having been admitted into the Jail after the issuance of the Court's injunction and not initially strip searched on their admission. Five of the six August 2002 incidents involved the discovery of drugs, with the remaining S.R.I. involving the discovery of a razor blade in an inmate's shoe. Two of the six August 2002 S.R.I.'s

involved the discovery of drugs in the Alpha Housing Unit, the area where all new inmates are placed for at least three business days, until the inmate classification process is completed.

In September of 2002, S.R.I.'s of contraband at the Jail again increased. For the month of September of 2002, there were five S.R.I.'s of contraband. Of these five S.R.I.'s, two of the involved inmates had been admitted to the Jail post injunction on misdemeanor charges and not strip searched on their admission to the Facility.

In addition to the aforementioned S.R.I.'s, OCCF personnel reported more contraband seizures during the months of August and September of 2002. For the months of January through July of 2002, Jail personnel reported sixteen incidents of contraband seizures at the Jail. For the month of August of 2002, OCCF personnel reported forty-two incidents of contraband seizures. For the month of September 2002, OCCF personnel reported twenty-nine incidents of contraband seizures.

As is clear from the foregoing, contraband introduced into the OCCF has increased significantly since the issuance of the District Court's injunction. State Reportable contraband seized during the months of August and September of 2002 consisted primarily of drugs and weapons. The safety and well being of both inmates and corrections officers have been compromised as a result of the District Court's injunction.

The County of Orange's interest in the outcome of this case is direct and immediate. At present, the County is operating its correctional facility under a District Court injunction which insists that Facility personnel consider factors, which are basically unavailable to them before conducting strip searches

of newly admitted inmates. The District Court's injunction mandates OCCF personnel to evaluate the crime charged, the circumstances of the arrest, and the detainee's characteristics before deciding whether there is reasonable suspicion to conduct an admissions strip search.

The standards mandated by the District Court are simply impractical in the environment of a corrections facility. The OCCF accepts inmates upon presentation of a valid securing order from a local magistrate or judge. In most of the admissions of inmates to the OCCF, the transporting officers are members of the Orange County's Sheriff's Office, and not from the arresting agency, with the exception of inmates admitted through arrests made by the City of Newburgh Police Department and the New York State Police. In those limited situations where inmates are brought into the OCCF by the arresting agencies, the transporting officers are usually not the same officers involved in the original arrest. Newly admitted inmates to the OCCF often have no more paperwork accompanying them than the actual securing order, which merely states the charges against them; at times, with nothing more listed than the relevant Penal Law section numbers.

OCCF booking officers have no information available to them regarding the detainee's actual arrest on that individual's admission to the Jail, other than the charges listed on the securing order. They have no contact with the arresting officers, nor do they have any paperwork from the arresting agency. As such, one of the factors to be considered in determining reasonable suspicion, which has been mandated by the District Court, is simply never available to the booking officers.

This "information gap" regarding the detainee's actual arrest is further compounded by the time lag OCCF personnel

encounter in classifying an inmate, in accordance with the guidelines as set forth by the State Commission of Correction. The State Commission of Correction requires that an inmate be classified within three business days. Routinely, OCCF personnel do not receive a positive identification of an inmate until days after he/she is first admitted to the facility. Until completion of the classification process, newly admitted inmates are housed together and have full contact with each other. The newly admitted inmates include parole violators, felony detainees, misdemeanor detainees, newly sentenced inmates and violation detainees. These detainees have full contact with both uniformed and civilian staff throughout the admissions procedures. Upon initial admission to the Facility, OCCF personnel have insufficient information upon which to determine who should be separated from whom.

The information received by Booking officers on an inmate's initial admission is strictly self-reported information and that limited information, which is reflected on the securing order. On admission, OCCF personnel are simply unaware of a particular inmate's criminal history or institutional behavior.

As is clear from the foregoing, the admissions procedures ordered by the District Court have resulted in a significant increase in contraband seizures at the Jail. This court ordered limitation of the Jail's prior Inmate Search policy has been noticed by the inmate population, as well as those recidivist offenders who are regularly admitted to the Jail. Often, detainees charged with a misdemeanor offense have had previous felony charges lodged against them. Statistics of new inmate admissions during the month of August 2002 reveal the following: of the 532 new inmate admissions during that month, 265 detainees were charged with misdemeanor or lesser offenses. Of those 265 detainees, 137 had prior felony arrests. In September of 2002, there were 501 new admissions to the

Jail. Of those admissions, 253 were for misdemeanor or lesser offenses. Of those 253 detainees, 146 had been previously arrested on felony charges.

Studies of correctional facilities have established that it is common for detainees to coerce or cajole individuals to smuggle contraband into the facilities. Obviously if body search procedures are relaxed for detainees charged with misdemeanor or lesser offenses, other inmates have now been provided with a new means of obtaining contraband in the Jail. This theory is clearly borne out by the increase in S.R.I.'s for the months of August and September of 2002 at the OCCF.

At the present time, the County of Orange is continuing to defend the *Dodge* case, litigating in both the United States District Court and the United States Court of Appeals for the Second Circuit. Discovery in the District Court action is completed and a Joint Pre-Trial Order has been filed. Plaintiffs have moved for summary judgment and the County has until November 21, 2002 to respond to that dispositive motion. The County has filed a petition for leave to appeal the District Court's decision granting class certification, to the Second Circuit. A decision on that petition is still pending. Additionally, the County has filed an appeal with the Second Circuit as of right, as to the District Court's injunction order of July 24, 2002.

ARGUMENT

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS

A. The Decision Below upholds the Second Circuit's decision in Weber v. Dell, 804 F.2d 796, 55 USLW 2316 (2nd Cir. N.Y.,1986) and fails to apply the prevailing standards set forth in this Court's Decision in Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)

The seminal case that establishes the constitutionality of body searches of inmates is *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In *Bell*, this Court held that, if a particular condition or restriction imposed on a pre-trial detainee is reasonably related to legitimate non-punitive governmental objectives, it does not, without more, amount to punishment. See, *Bell*, 441 U.S. at 539; *see also, Bowman v. City of Middletown*, 91 F.Supp.2d 644 (S.D.N.Y. 2000). In determining the constitutionality of body searches of inmates, this Court held that institutional security and preserving internal order and discipline were essential goals that may require limitation or retraction of retained constitutional rights of pre-trial detainees. Accordingly, prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel. *See, Bell*, 441 U.S. at 546.

In light of the problems that arise in the daily operations of a correctional facility, prison administrators should be accorded wide-ranging deference in adoption and execution of policies and practices that, in their judgment, are necessary to preserve internal order, security and safety. *See, Bell*, 441 U.S.

at 547 (*citing, Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) [additional citations omitted]). "Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974).

In *Bell*, this Court found that the practice of conducting visual body-cavity searches of pre-trial detainees after contact visits did not violate the Fourth and Fifth Amendments. When balancing the significant and legitimate security and safety interests of the facility as against the inmates' privacy interests, this Court held that such searches could be conducted on less than probable cause and were not unreasonable. *See, Bell*, 441 U.S. at 558. While the test of reasonableness under the Fourth Amendment was not capable of precise definition or mechanical application, this Court stated that each case required a balancing of the particular need for the search against the invasion of personal rights that the search engendered. Courts must consider the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it and the place in which it is conducted. *See, Bell*, 441 U.S. at 559.

Subsequent to *Bell*, this Court decided the case of *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), involving the constitutionality of prison restrictions on an inmate's right to marry. In *Turner*, this Court determined that the standard of review for a prison regulation and its constitutionality is whether the regulation is reasonably related to legitimate penological interests. In determining reasonableness, the relevant factors to be considered by the Courts include: (a) whether there is a valid, rational connection between the

regulation and a legitimate, neutral governmental interest; (b) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates; (c) what extent the proffered accommodation of the asserted right will have on prison staff, prisoners' liberty and the allocation of limited prison resources; and (d) whether the regulation represents an exaggerated response to prison concerns. *See, Turner*, 482 U.S. at 89, 107 S.Ct. at 2262; *see also, Nicholas v. Miller*, 189 F.3d 191 (2nd Cir., N.Y. 1999). The *Turner* Court further found that application of the foregoing test would require particular deference to the expertise of correction officials. *See, Turner*, 482 U.S. at 90.

The holding of this Court in the case of *Turner*, 482 U.S. at 78, implicitly overruled the Second Circuit's decision in the case of *Weber*, 804 F.2d at 796. In his dissent in the case below, the Honorable Jose A. Cabranes suggested that Second Circuit cases since *Weber* and *Turner* have been decided using two different standards: (1) that of "reasonable suspicion" as set forth in *Weber;* and (2) that of "reasonable relation to legitimate penological objectives", as set forth in *Turner*. Judge Cabranes determined that the standard set forth in *Turner* must prevail, as this Court decided this particular case. In further support of his position, Judge Cabranes noted that in no other case was a distinction made between "jails" and "prisons," as was done by the majority in the *Shain v. Ellison* [273 F.3d 56 (2d Cir. N.Y., 2001)] case to support its decision that the *Weber* standard applied to body searches of misdemeanor pre-trial detainees. Judge Cabranes further noted that other Circuits "routinely" applied the *Turner* standard to cases involving "jails." *See, Shain*, 273 F.3d at 71.

The State Courts in New York have also deferred to the authority of correction officials in the creation and implementation of policies relating to inmate management, security, safety

and discipline. *See, Clow v. Coughlin*, 222 A.D.2d 781, 634 N.Y.S.2d 823 (3rd Dept. 1995); *Allah v. Coughlin*, 190 A.D.2d 233, 599 N.Y.S.2d 651 (3rd Dept. 1993).

In the case of *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992), the Second Circuit ruled that random visual body-cavity searches of inmates were related to legitimate penological interests. The *Covino* Court found that there were no viable alternative means that would allow prisoners to exercise limited bodily privacy rights, which, at the same time, would allow corrections officials to fully achieve the effectiveness of the challenged searches. *See, Covino*, 967 F.2d at 79. The *Covino* Court further noted that the *Turner* requirement of a reasonable alternative required the Plaintiff inmate to point to an alternative policy that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests. *See, Covino*, 967 F.2d at 80.

OCCF personnel accept pre-trial detainees pursuant to lawful securing orders, issued by various local Courts. In most cases, the transport of these detainees is conducted by Orange County Sheriff's officers, not by officers from the arresting agencies, with the exception of inmates admitted through arrests made by the City of Newburgh Police Department and the New York State Police. As such, corrections officials at the OCCF, rarely, if ever, are provided with any information regarding the circumstances of a particular detainee's arrest, one of the criteria the *Weber* Court permitted when considering reasonable suspicion for a strip search. The fact that a pre-trial detainee may have been searched by the arresting agency is of no consequence as basic corrections training requires an officer to treat an incoming inmate as if he/she had never been searched. A corrections officer is trained that he/she cannot assume that any newly admitted inmate has been properly searched by anyone other than him/herself.

B. The New York State Commission of Correction requires immediate screening and visual assessment, with classifications procedures mandated to be completed within three business days.

Pursuant to the Rules and Regulations of the State of New York, Commission of Corrections, each inmate on admission to a local correctional facility shall undergo an initial screening and risk assessment, which shall consist of a screening interview, visual assessment and review of commitment documents. Such screening and assessment shall occur immediately upon an inmate's admission. 9 NYCRR Section 7013.7(a). In pertinent part, the State regulations further provide that a screening instrument shall be utilized to elicit and record information on each inmate relating to the following:

> (1) visible injury/injuries;
> (2) medical conditions requiring immediate treatment;
> (3) mental or physical handicap(s)....
> (6) history of detention or incarceration, including but not limited to hostile relationships with other inmates...
> (8) present appearance and behavior...
> (10) criminal charge(s) and conviction(s); and
> (11) any other relevant information concerning the safety or welfare of the inmate.

See, 9 NYCRR Section 7013.7(b). Lastly, the State regulations require that "an immediate decision concerning the disposition of each inmate shall be made on the basis of information gathered during initial screening and risk assessment." 9 NYCRR Section 7013.7(c).

State Commission of Correction regulations require that classification of an inmate [the process by which an inmate is assigned to a particular housing unit, with consideration given to his/her security, supervision and special needs] be completed within three business days. See, 9 NYCRR 7013.8. Until that classifications process is completed, all newly admitted inmates are housed temporarily in the same area. In light of the foregoing State regulations governing the operation of local correctional facilities, as well as the legitimate penological interests of inmates' and corrections officers' health and safety, the Sheriff of Orange County implemented the policy of body searches for each inmate admitted to the OCCF. Significantly, the New York State Commission of Correction, never objected to, nor cited the OCCF's body search policies as being improper, inappropriate or unconstitutional in any of the Commission's surveys performed during the years 1999 through the present date.

The Second Circuit has applied both the *Weber* and the *Turner* standards in cases involving correctional facility regulations. There is conflict within the Circuit itself as to what standard should be applied to correctional facility regulations. There is conflict among the Circuits across the country as to what standard should be applied to correctional facility regulations [*See, Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999)(*en banc*) *cert. denied*, 529 U.S. 1018 (2000); *Siddiqi v. Leak*, 880 F.2d 904 (7th Cir. 1989)]; as well as under what circumstances are body searches of pre-trial detainees appropriate on their admission to correctional facilities. [*See, Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995); *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989); *Dobrowolskyj v. Jefferson County, Ky.*, 823 F.2d 955 (6th Cir. 1987) *cert. denied*, 484 U.S. 1059 (1988)]. Correctional officials are in the best position to determine the security needs of their facilities. If correctional

facility regulations do not infringe on constitutional rights, the decisions of correctional administrators must be respected. In these post-9/11/01 times of heightened security concerns, corrections personnel throughout the nation are more than reasonable in their desire to prevent the introduction of contraband into their facilities. As such, their expertise in such matters should be deferred to by all Courts, according to the standards enunciated by this Court in the *Turner* case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Goshen, N.Y.
October 25, 2002

Respectfully Submitted,

Richard B. Golden
Of Counsel

CATHERINE M. BARTLETT
County Attorney of Orange County
255-275 Main Street
Goshen, New York 10924
(845) 291-3150

On the Brief,
Christina M. Sanabria

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(4)

In the

Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

vs.

RAY E. SHAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CORRECTION OFFICERS' BENEVOLENT ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD J. KOEHLER
MARC ALAIN STEIER
KOEHLER & ISAACS, LLP
Attorneys for Amicus Curiae
Correction Officers' Benevolent Association
120 Broadway — 29th Floor
New York, New York 10271
(917) 551-1300

November 5, 2002

27 pp

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF [1]

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, the Correction Officers' Benevolent Association, Inc. ("COBA") hereby moves this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioners. The brief follows this motion. COBA urges the Court to reverse the decision of the Second Circuit which held that individuals arraigned on misdemeanor charges may not Constitutionally be strip searched prior to admission to a "jail" absent individualized reasonable suspicion that the inmate is in possession of contraband.

COBA has requested leave of the parties' counsel to file an *amicus curiae* brief, but has secured such consent only from counsel for Petitioners.

COBA is the certified bargaining representative for nearly 11,000 men and women Correction Officers who work for one of the largest municipal correctional systems in the nation — the New York City Department of Correction ("NYCDOC"). Responsibility for the safety and security of inmates, visitors, and both uniformed and non-uniformed NYCDOC staff falls largely to the members of COBA. However, under the Second Circuit's analysis in *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001) this legitimate safety interest has been compromised. COBA members are now prohibited from conducting routine strip-searches of new admittees to facilities under the control of the NYCDOC; a correctional system where, regardless of the charge on which they have been arraigned, inmates are inserted into the

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[1] Pursuant to Rule 37.6 of this Court, counsel for *amicus curiae* authored this brief in its entirety. No monetary contribution was made to the preparation of this brief by any person or entity other than *amicus curiae* and its counsel.

general population of nearly 14,000 incarcerated people on Rikers Island.

The fallacious jail/prison distinction made by the Circuit Court fails to take into consideration the qualitative and quantitative differences between small facilities which are termed "jails," and one of the largest American municipal correctional facilities — Rikers Island — which is a "jail" under the Circuit Court's analysis. The Circuit Court's decision impermissibly interferes with legitimate security concerns of correctional authorities, and is a barrier to the safe operation and administration of the NYCDOC by COBA members. The input of COBA would be helpful to the Court in resolving this matter.

Given the dire ramifications of the Circuit Court's decision upon the day-to-day operations of the NYCDOC and the safety of COBA members and their charges, *amicus curiae* respectfully request that this Honorable Court grant it leave to file the attached brief.

QUESTION PRESENTED FOR REVIEW

Like the Nassau County Correctional Center ("NCCC"), the New York City Department of Correction ("NYCDOC"), for which Correction Officers' Benevolent Association ("COBA") members work, has a policy of strip searching all those admitted to the care of the NYCDOC in order to prevent entry of weapons, drugs, and other contraband into the system. However, the Second Circuit applied a heightened "reasonable suspicion" standard first articulated in *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), and declared the NCCC strip search policy in violation of the Fourth Amendment of the United States Constitution. *Shain v. Ellison,* 273 F.3d 56 (2d Cir. 2001).

As set forth in the dissent of Circuit Judge Cabranes, this ruling conflicts with several other Circuits which apply to such searches this Court's more deferential "reasonably related to legitimate penological objectives" standard established one year after *Weber* in *Turner v. Safley*, 482 U.S. 78 (1987). According to the Circuit Court, *Turner's* holding is limited to cases involving "prisons" and does not apply to "jails" such as NCCC or the system operated by the NYCDOC; which, whether termed a "prison" or "jail," is one of the largest municipal correctional institutions in the United States.

The question presented is: Whether this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987), that a prison regulation is constitutional if it bears a reasonable relation to a legitimate penological objective, applies to any detention facility, whether it is called a jail, a prison or a correctional center?

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INTEREST OF *AMICI*

COBA is the certified bargaining representative for the nearly 11,000 men and women Correction Officers who work for one of the largest municipal correctional systems in the nation — the New York City Department of Correction ("NYCDOC"). Responsibility for the safety and security of inmates, visitors, and both uniformed and non-uniformed NYCDOC staff falls largely to the members of COBA.

The NYCDOC averages a daily inmate population of approximately 14,500[1] — more than the incarcerated population in any of 35 states. On a day to day basis the men and women of COBA transport approximately 1,700 inmates to 15 court detention facilities in the 5 boroughs of New York City. The NYCDOC admits into custody somewhere between 120,000 and 130,000 inmates annually. Of these, nearly 70% are pre-trial detainees — charged with misdemeanors and felonies. In some cases these detainees are residents of Rikers Island[2] due to an inability to meet bail set by a Judge. However, in many more cases, these pre-trial detainees have been placed into the custody of the NYCDOC by a Judge due to the nature of the crime charged, particular criminal history, or other factors.

As with the NCCC, the remainder of inmates are misdemeanants and felons serving terms one year or less, parole violators awaiting parole revocation hearings, state inmates awaiting either transfer to state facilities or resumption of court proceedings, and state "contract" convicts serving their time at Rikers. It must be noted that inmates in the NYCDOC

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[1] Comparatively, the NCCC houses approximately 1,800 inmates daily, and cycles only about 14,000 people through its' system annually. *Shain*, 273 F.3d at 74 (Cabranes, J., dissenting).

[2] This term refers generally to the ten jails housing men and women for the NYCDOC. For more information on the NYCDOC, please see the web site at http://www.nyc.gov/html/overview.html.

system, like inmates at NCCC, are not assigned to housing based upon pending charges, but rather factors such as age, gender, sexual orientation, prior history of behavior within the NYCDOC system, or particular medical needs.

Should the Second Circuit decision stand, COBA members will be unable to keep contraband from entering the NYCDOC system. This will have dire consequences on the safety of inmates and staff.

SUMMARY OF ARGUMENT

In *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001), the Second Circuit departed from this Court's jurisprudence concerning prison regulations. The majority in *Shain* held that visual strip/body cavity searches of misdemeanant pre-trial detainees, absent a "reasonable suspicion" that the person being searched possessed contraband, violates the Fourth Amendment. The Circuit Court applied this standard developed in *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986) rather than the "reasonably related to penological interests" standard developed by this Court a year later in *Turner v. Safley,* 482 U.S. 78, 89-90 (1987). The *Turner* standard has been applied by numerous Circuit Courts. Indeed, the Second Circuit ignored that it had previously applied the "reasonably related" standard in the context of strip searching a pre-trial detainee who was commingled with sentenced inmates. *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992). By their ruling, the Circuit Court succeeded in "[creating] a Circuit split where there was none — a Circuit split that calls out for resolution by the Supreme Court." *Shain*, 273 F.3d at 70 (Cabranes, J., dissenting).

The Circuit Court justified this choice of standard by mechanically differentiating "jails," such as the NCCC or Rikers Island, from "prisons." As was established by the dissent, there is no basis in this Court's jurisprudence for the "untenable distinction" between "jails" and "prisons" when

dealing with strip searching new admittees to a correctional facility. *Shain*, 273 F.3d at 70 (Cabranes, J., dissenting). For three decades it has been the developing jurisprudence of this Court to avoid unnecessary judicial intrusion into the decisions made by corrections professionals concerning institutional security. However, the "reasonable suspicion" standard utilized by the Circuit Court reverses thirty years of jurisprudence by now holding corrections personnel to the standard which applies to police searches incident to an arrest. In so-doing, the Second Circuit has identified an expectation of privacy in correctional facilities which runs counter to that level previously found appropriate by this Court.

It is therefore of vital importance that the Petition be granted and the decision of the Circuit Court be reversed and remanded for the application of the *Turner* standard.

ARGUMENT

A. Constitutional Standards Applied to Pre-Trial Detainees, Strip Searches, and Prison Regulations

While pre-trial detainees do not forfeit their constitutional rights at the jailhouse door, they simply do not "possess the full range of freedoms of an unincarcerated individual." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Rather, a detainee's rights must be balanced against "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution." *Id.* This Court has long tempered this balancing test by a principled position of deference to prison officials and avoidance of court involvement in prison administration — especially federal court interference in the running of state institutions. *Procunier v. Martinez*, 416 U.S. 396 (1974). This principle of deference to prison administrators was again reaffirmed by this Court just two terms ago. *Shaw v. Murphy*, 532 U.S. 223 (2001).

Courts have recognized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," and therefore assessing the reasonableness of a strip search procedure requires a balancing approach rather than the restricted "jail/prison" approach endorsed by the Second Circuit. *Bell*, 441 U.S. at 559. As stated in *Bell*, "each case requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* Positing such balancing is one thing; to apply it correctly in the practical world of corrections is another matter.

In *Turner v. Safley*, this Court established a standard for evaluating the constitutionality of prison regulations which may impinge upon an inmate's First Amendment rights. *Turner*, 482 U.S. at 89-90. That standard assesses whether the regulation is "reasonably related to legitimate penological interests." In 1990, this Court made explicit that the *Turner* standard was not limited to First Amendment challenges to prison regulations, but should be applied in all cases "when a prison regulation impinges on inmates' constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). Indeed, the *Turner* test has been applied by the Circuit Courts in the context of gainsaying institutional security by strip searching prisoners. *See e.g., Farmer v. Perill*, 288 F.3d 1254 (10th Cir. 2002) (strip search and visual cavity inspection of inmate going from Special Housing Unit to recreation yard); *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (maximum security prisoners searched on entering and leaving unit). This Court explained that the adoption of this standard was to reconcile the somewhat limited rights of the incarcerated "with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Turner*, 482 U.S. at 84-85. This significant principle of deference to correctional professionals, such as are represented by COBA, underscores the need to grant the Petition and overturn the Second Circuit's erroneous decision in *Shain*.

B. The Circuit Court Relied Upon an Unsound Distinction Between "Jails" and "Prisons"

In attempting to reconcile the issue of strip searches of pre-trial detainees with precedent in the Circuit, the *Shain* Court constructed its reasoning in applying the higher "reasonable suspicion" standard around a pretended distinction between a "prison" and a "jail." This, notwithstanding that this Court has a developed jurisprudence concerning the "reasonably related" standard. To permit this false dichotomy built around the "jail/prison axis" requires that this Court accept several false assumptions. *Shain*, 273 F.3d at 71 (Cabranes, J., dissenting).

First, this Court must reject its own jurisprudence leading to *Turner*. As was adroitly pointed out by Judge Cabranes' dissent, the evolution of the "reasonably related" test manifested this Court's intention that the same standard should apply to both "jails" and "prisons." *Shain*, 273 F.3d at 73 (Cabranes, J., dissenting). Indeed, the four cases which were the foundation for the standard enunciated in *Turner* dealt with both jail and prison settings. *See, Pell v. Procunier*, 417 U.S. 817 (1974) (concerning a prison); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (addressing issues in a prison and a jail); *Bell v. Wolfish*, 441 U.S. 520 (1979) (regarding a jail); *Block v. Rutherford*, 468 U.S. 576 (1984) (addressing a jail). This Court's own jurisprudence makes clear that the "jail/prison" distinction drawn by the Second Circuit cannot be abided.

Second, the decision in *Shain* runs counter to this Court's jurisprudence dealing with regulations in jails and prisons. Moreover, as was pointed out by the dissent below, the *Turner* test has been applied in many Circuits both in jail settings and to pre-trial detainees. *See e.g., Veney v. T.V. Wyche*, 293 F.3d 726 (4th Cir. 2002) (*Turner* applied to Riverside regional jail in Hopewell, Virginia); *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) *(en banc)*, *cert. denied*, 529 U.S.

1018 (2000) (*Turner* applied to claim brought by county jail inmate); *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998) (acknowledging that separation of male and female inmates in county jail satisfies penological interests); *Reynolds v. Wagner*, 128 F.3d 166 (3rd Cir. 1997) (*Turner* analysis, rather than strict scrutiny, applied to Berks County "prison" which held pre-trial detainees, sentenced inmates and federal contract inmates); *Walker v. Navarro County Jail*, 4 F.3d 410 (6th Cir. 1996), *reh'g denied*, 1997 WL 42523 (6th Cir. Nov. 26, 1996) (pre-trial detainee in jail); *Anderson v. County of Kern*, 75 F.3d 448 (9th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) (pre-trial detainee and convicts in County Jail); *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996) (pre-trial detainee in Cook County Jail); *Harris v. Bolin*, 950 F.2d 547 (8th Cir. 1991) (pre-trial detainee in County detention center).

This "semantic" distinction derided by Judge Cabranes in his dissent is all the more difficult to accept given that it rests on static definitions rather than corrections realities. The Circuit Court presumed that the contemporary usage of the terms "prison" and "jail" follows the definitions found in *Black's Law Dictionary*.[3] Rather, the terms are routinely interchanged "by everyone other than students of penology." *Shain*, 273 F.3d at 72 fn. 3 (Cabranes, J., dissenting).

The question is why the *Turner* standard, which has proved so adaptable in the various Circuits, should now pose a

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[3] Admittedly, some theoretical differences can be found between jails and prisons. However, what is in theory is not in reality. The Second Circuit does not cite to any supporting case law or empirical data embracing this distinction. The Court can defend its position only by restricting its reasoning to *Black's* derivative rather than direct definitions of "prison" and "jail." First definition of prison: "a public building or other place for the confinement for persons whether as punishment imposed by the law or otherwise in the course of the administration of justice." *Black's Law Dictionary*, 1194 (7th ed. 1999). First definition of jail: "a gaol; a prison." *Id.* at 834.

problem for the Second Circuit. Indeed, no barrier existed prior to *Shain* when the *Turner* standard was applied by the Second Circuit not only to pre-trial detainees in "prison" contexts, but to "jail" settings as well.

In *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992), the Second Circuit used the *Turner* standard as applied to the rights of a pre-trial detainee who had only been charged of a crime and not convicted. In so doing, the Circuit determined that an arrestee might, under some circumstances, be subjected to a cavity search without individualized (i.e. "reasonable") suspicion. *Id.* at 77-78. Like the dissent below, COBA believes that the Second Circuit failed to distinguish its departure from this standard. Rather, it would seem that the Second Circuit's ruling was unduly influenced by its prior decision in *Weber v. Dell*. *Weber* and its progeny are inapposite because, as the City of New York has pointed out in its *amicus curiae* brief, these cases involved *pre*-arraignment detainees. Brief for City of New York at 14. The strip searches were conducted *prior* to a judicial determination that probable cause warranted further incarceration — very much in contrast with the situations dealing with *post*-arraignment arrestees.

Furthermore, Judge Cabranes prudently notes that subsequent cases affirming *Weber, Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988) and *Wachtler v. Herkimer County*, 35 F.3d 77 (2d Cir. 1994), completely failed to address the *Turner* standard. Hence, this whole line of reasoning may be considered to have been overruled *sub silentio* by this Court's decision in *Turner*. *Shain*, 273 F.3d at 74 fn. 5 (Cabranes, J., dissenting). Moreover, and perhaps more damaging, the Circuit Court glosses over the fact that it *has* approved of *Turner's* application to the balance between a pre-trial detainee's constitutional rights and regulations in a jail setting. *See, United States v. El-Hage*, 213 F.3d 74, 81-82 (2d Cir.), *cert. denied*,

531 U.S. 881 (2000). COBA offers that the arguments advanced by the Circuit Court are completely unconvincing for departing from the *Turner* standard and the "well-settled, non-technical meaning of the word 'prison.'" *Shain*, 273 F.3d at 72 (Cabranes, J., dissenting). Since the Circuit Court has applied *Turner's* "reasonably related" standard to what qualifies as a jail, by its own typology, it should be directed to do so now by this Honorable Court.

The Second Circuit's position fails to recognize that maintaining institutional security is a legitimate penological interest within jails. This position is based upon the fallacious assumption that only persons charged with minor offenses, or who have been convicted of misdemeanors, populate "jails," and those convicted of felonies populate "prisons." The unspoken bias of the Second Circuit is that the latter group has a greater propensity for smuggling contraband or for being violent. This Court rejected the same argument almost three decades ago, and recognized that in many cases pre-trial detainees pose a greater security risk than do convicts. *Bell,* 441 U.S. at 547. Moreover, having different standards for pre- and post-trial inmates would seem to run afoul of this Court's clear statement in *Bell* that prison officials need not distinguish between convicted inmates and pre-trial detainees when developing security practices. *Bell*, 441 U.S. at 546 fn. 28. *See also*, *Dufrin v. Spreen,* 712 F.2d 1084, 1087-1088 (6th Cir. 1983) (pre-trial detainee need not be segregated from prison population).

Like NCCC, it is the policy of the NYCDOC to conduct a strip search with a visual body cavity search when processing all new admissions into the general population at Rikers Island. In the case of the NYCDOC, inmates returning from Court, a hospital or outside medical facility, work release, funeral or other circumstance, are strip searched without a visual body cavity search. The reason for these searches is the sheer number of interactions which new admissions can have

with inmates and others who may seek to have contraband introduced into the NYCDOC system.

From the time an individual is arrested, to the time he is admitted to Rikers Island, there exist numerous opportunities for the pre-trial detainee to co-mingle with other arrestees. These arrestees may be charged or even convicted of minor or serious crimes. After a person is arrested he is placed in a cell at a precinct station house. The detainee is mixed in with a number of other arrestees who are then all together transported to "central booking." Upon arrival at central booking, the detainee is held in police pens, mixed with other arrestees, misdemeanants and felons, while awaiting finger-printing and photographing. The detainee is then transferred to one of fifteen court pens, which are notoriously over-crowded, where he is once again intermingled with dozens of people charged with offenses, minor and serious. During arraignment, the detainee may come in contact with family and friends, and certainly with his lawyer. Once a detainee is remanded or held on bail, he is returned to the same court pens and then transferred into the custody of the NYCDOC. At this point he is given a physical, medical and blood tests, and, finally, a visual (non-cavity intrusive) strip search. The arrestee is yet again mixed with other pre-trial detainees held on misdemeanor and felony charges who are transported to the appropriate jail on Rikers Island. After arriving at Rikers, he is placed in a receiving room according to rudimentary characteristics such as gender, age, and medical needs. It is not until later in the intake process, when housing is determined, that classification centers around an inmate's propensity for danger or crime charged. By this point, the person has potentially come into contact with dozens of inmates for whom he may have smuggled contraband, or to whom such could have been passed. It must be stressed that each time a detainee is transported to court, which occurs 1700 times per day at the NYCDOC, this same commingling process is

repeated. Thus the chances for contraband to be brought into the NYCDOC system are multiplied many fold.

The Second Circuit has held that a strip/body search policy is unconstitutional because there is a "substantial difference between jail and prison populations." *Shain*, 273 F.3d at 56. This perspective disregards the "quality" of inmates typically housed at Rikers Island. For example, pursuant to legislative mandate contract inmates serving felony sentences are housed at the jails for a specified time periods. *See,* N.Y. Correct. Law § 95 (McKinney 2002). State detainees, including convicted felons, are brought to Rikers to adjudicate a current case or to await transfer to the appropriate state facility. Indeed, New York State prisons are often overcrowded and lack room to house convicted felons who are then held in jails. Often, sentencing guidelines, rather than misdemeanor/ felony distinctions, play a significant role in determining jail and prison populations.[4] Also, someone charged with a felony may plea bargain a sentence to be served on Rikers. Crowded court dockets may leave a person who is charged with a violent felony, such as murder in the second-degree, waiting in the jail; a wait that can often take up to two years. Indeed, one case in which *Turner* was applied in the Second Circuit, involved an approximate 30 month incarceration of an Al-Qaeda associate charged with felonies. *El-Hage*, 213 F.3d 74.

Finally, the Second Circuit's typology fails to acknowledge the evolving science of penology. Many states have developed programs and initiatives servicing inmates which

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[4] When the Second Circuit relied on the differences in sentence length for misdemeanants and felons in N.Y. Penal Law Sections 70.00(1) and 70.15 to support its jail/prison distinction, the court need only have looked at section 70.00 (4) to realize this error. Under this section, an individual convicted of felony possession of a loaded weapon can be given a definite sentence and remanded to the local jail facility. *See*, N.Y. Penal Law §§ 70.00(1), (4) and 265.02.

do not easily fall into the jail/prison dichotomy. For example, the Kentucky Class D Felony Program allows certain felons to be housed in county jails and provide community service. In Texas, the jail system houses state felons serving sentences up to two years or less followed by community supervision. Furthermore, twelve states have jails authorized to house persons convicted for one year or more. *See*, Silverman, *Corrections Today: A Comprehensive Overview* 442 (2d ed. 2001). In New York, local correctional facilities often provide substance abuse or mental health counseling treatment to those convicted of misdemeanors or felonies. These institutional innovations have been designed with deference to the intricate needs of a heterogeneous inmate population; deference recognized as important by this Court in *Bell*. The facilities providing such services do not fall neatly along the jail/prison "axis" as evinced by the Second Circuit. *Shain*, 273 F.3d at 71 (Cabranes, J., dissenting).

Given these myriad common scenarios, it is amazing that the Second Circuit hinges the resolution of a constitutional issue on a legal fiction distinguishing "jails" from "prisons." This ignores very real security concerns and the only sure method of securing the safety of inmates and staff alike.

C. Strip/Body Cavity Searches of Pre-Trial Detainees are Constitutional Under *Turner*

1. The *Turner* Factors

In setting out the *Turner* "reasonably related" test established in 1987, this Court articulated four factors for determining whether a regulation or practice is sufficiently reasonable to pass constitutional muster. Where these factors are met, the judiciary should not substitute its judgment for that of corrections professionals. *Turner*, 482 U.S. at 84-89. The first of these four factors is whether a valid, rational connection exists between the restriction and a legitimate penological interest. If this is fulfilled, the inquiry turns to

whether an inmate has alternative means of exercising the purported right; the impact an "accommodation" would have on correction officers, staff, other inmates, and on a facilities' resources; and the existence or absence of a reasonable alternative to the regulation or practice. *Turner*, 482 U.S. at 89-91. A proper examination of the *Turner* factors, as applied to the NCCC policy and procedure as well as that utilized by the NYCDOC, makes clear that both regulations are reasonably related to a legitimate penological interest, and that these policies and procedures are constitutional.

2. Screening for Contraband and Institutional Security are Legitimate Penological Interests

There can be no serious contention that the overarching interests of security and safety implicated with the smuggling of drugs and weapons into jails is anything but a "legitimate penological interest." *See, Mauro v. Arpaio*, 188 F.3d at 1059. This Court has long approved the security interest with searching pre-trial detainees and convicted inmates after contact visits, and in searching cells of the same to retrieve contraband. *See, Bell v. Wolfish*, 441 U.S. 520 (1974) (searches with all post-contact visit); *Block v. Rutherford*, 469 U.S. 576 (1984) (pre-trial detainees and cell searches). Moreover, COBA is ever mindful not only that the safety of Correction Officers and staff are central to prison administration, but that the Constitution imposes a duty to ensure the safety of prisoners. *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984).

As corrections professionals, COBA members know that the reality is "(e)ven those simply placed in a holding cell could pose a danger to themselves, other inmates, and the guards." *Magill v. Lee County*, 990 F.Supp. 1382 (M.D. Ala.), *aff'd.*, 161 F.3d 22 (11th Cir. 1998). In combating this reality, one of the most effective tools available to the correctional professional is the strip search. *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992). This

Court in *Bell* observed that "there is no basis for concluding that pre-trial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Bell*, 441 U.S. at 546 fn. 28. Pre-trial detainees are by definition "persons unable to meet bail — often are awaiting trial for serious, violent offenses, and many have prior criminal convictions." *Block*, 468 U.S. at 586. This is particularly true at Rikers, where convicts are serving short terms of incarceration as compared with many pre-trial detainees who face the possibility of lengthy imprisonment if convicted. Certainly, the placement of a pre-trial detainee into the general population of a jail has been recognized by Circuit Courts as an important factor to be considered in deciding to conduct a strip search. *Cottrell v. Kaysville City*, 994 F.2d 730 (10th Cir. 1993); *Fuller v. M.G. Jewelry*, 950 F.2d 1437 (9th Cir. 1991); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 952 (1982). Hence, it cannot be said that an inmate's status as a pre-trial detainee should exempt him from the legitimate security concern of contraband which all jails and prisons face.

3. No Alternative Would Meet the Legitimate Security Interest of Strip Searching New Admittees

Under *Turner*, once it is determined that the interest is legitimate and reasonable, the inquiry turns on whether alternative means of exercising the purported "right" exist; the impact an "accommodation" would have on correction officers, staff, other inmates, and on a facilities' resources; and, the existence or absence of a "reasonable alternative" to the regulation or practice. In the current context, the answer to all three is negative.

Since the "right" in question is that of privacy from visual strip searches — which includes the close examination of clothing once removed — the only option is for the pre-trial detainee to remain fully clothed. As for "accommodation," the only option to searching would be to keep pre-trial detainees from the general population at all points in their incarceration, since there are many times (discussed *supra* at B) when new admittees come into contact with inmates. To develop a separate housing and transportation system to handle misdemeanants who cannot be strip-searched — which is the only alternative that COBA can envision — would be cumbersome, expensive, and still pose the danger that the misdemeanant would independently act to smuggle drugs and weapons. Indeed, practical considerations aside, and the untold impact on resources and safety for all, the courts have rejected such segregated housing. *Mayoral v. Sheehan*, 245 F.3d 934 (7th Cir. 2001) (rejecting pre-trial detainee challenge to failure to screen and segregate gang-affiliated inmates); *Dufrin*, 712 F.2d at 1087-1088 (pre-trial detainee need not be segregated from prison population). Finally, as for "alternate" practices, the fact is that nothing is more effective in both uncovering contraband and serving as a deterrent to smuggling than the visual strip search. *See, Bell*, 441 U.S. at 559 fn. 40 (rejecting alternative of metal detectors as ineffectual).

It is expected that an argument will be advanced that applying *Turner* will be tantamount to putting prison regulations beyond judicial review. This is far from the truth. *See e.g., Bear v. Kautzky*, 2002 WL 31203882 (8th Cir. Oct. 4, 2002) (preliminary injunction granted to prisoners under *Turner*); *Wolf v. Ashcroft*, 297 F.3d 305 (3d Cir. 2002) (misapplication of *Turner*, no rational relationship shown; remanded); *Bazzetta v. McGinniss*, 286 F.3d 311 (6th Cir. 2002), *pet. for cert. filed* (U.S. Jul. 18, 2002)(No. 02-94) (visitation restrictions violated First Amendment associational rights, Eighth Amendment rights, and Fourteenth Amendment due process

rights); *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (prison regulation fails *Turner*'s "reasonably related" nexus); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (no rational relationship between legitimate interest and regulation); *Harris v. Ostrout*, 65 F.3d 912 (11th Cir. 1995) (striking strip search as "devoid of penological interest and imposed simply to inflict pain"); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), *cert. denied*, 498 U.S. 951(1990) (less restrictive alternative exists to meet alternative prong of *Turner* test); *Ashker v. California Dept. of Corrections*, 2002 WL 31155116 (N.D. Cal. Sept. 11, 2002) (book policy arbitrary and does not reasonably meet legitimate penological objective); *Clement v. California Dept. of Corrections*, 2002 WL 31050915 (N.D.Ca. Sept. 9, 2002) (no rational connection between penological interest and internet-based document ban policy). Clearly, challenges to overreaching prison policies have been successful under *Turner*. As this Court has determined in a matter dealing with deference granted to prison administrators, "deference does not insulate from review actions taken in bad faith and for no legitimate purpose." *Whitley v. Albers*, 475 U.S. 312 (1986). Individual abuses of any policing function may occur, but the solution is litigation to curb the individual instance in question. Here, the Second Circuit has disabled a time-tested system which reasonably and rationally meets the institutional needs of facilities like the NYCDOC. Such large complex correctional systems require all new admittees to be searched lest contraband be allowed into the system. Hobbling correction officials and making these institutions run less safely and intelligently is not what our Constitution requires. *Shain*, 273 F.3d at 75 (Cabranes, J., dissenting).

D. The Circuit Court's Decision Undermines Security and Misapplies this Court's Precedent

The logical conclusion of applying the intrusive judicial review standard used by the Second Circuit would exempt

all post-arraignment misdemeanor arrestees from being strip searched — which is still the most effective method of detecting the entry of drugs, weapons and other contraband into a correctional institution. This means that "jail" systems like the NYCDOC become less safe for all concerned. As was pointed out by Circuit Judge Cabranes, the "difficulty with the majority's holding is that it interprets the Constitution as requiring large, complex facilities such as the NCCC to be run less intelligently — and less safely— than ought to be the case." *Shain,* 273 F.3d at 75 (Cabranes, J., dissenting).

This point has been driven home in two post-*Shain* District Court decisions which go far beyond what this Court's jurisprudence should permit. In *Dodge v. County of Orange,* 209 F.R.D. 65, 2002 U.S. Dist. Lexis 13374, No. 02 Civ. 769 (S.D.N.Y. July 24, 2002) the practical impact of *Shain* is made clear by granting a preliminary injunction against the rigorous strip search procedure employed by the Orange County Correctional Facility. The procedure struck down in *Dodge* was developed only after reviewing the procedures being used in New York and New Jersey, as well as Second Circuit case law. The policy permitted strip searches under ten particular circumstances. *Id.* at 67.[5] Ultimately, the District Court Judge held that none of the factors which triggered the strip-search procedure amounted to individualized reasonable suspicion, and thus the policy ran afoul of the Fourth Amendment. In the even more recent case also stemming from Orange County, a Federal District Court Judge extended *Shain* to apply to not only those charged with misdemeanors, but felonies as well. *Murcia v. County of Orange,* 2002 WL

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[5] a) committed sentenced inmate/weekenders; b) committed probation/ parole violators; c) weapons or narcotics offenses; d) known gang affiliation; e) prior or current escape charges; f) committed for a felony; g) prior or current contraband charges; h) known history of contraband charges; i) metal detector/BOSS chair activation; j) inmate appears to be under the influence of drugs/alcohol. *Id.* at 65.

31245264 (S.D.N.Y. Oct. 4, 2002)(No. 00 CIV. 1325). These decisions have boot-strapped the impermissible "jail/prison" distinction made in *Shain*, and turn the necessarily deferential *Bell* jurisprudence of this Court on its head.

As is illustrated by these recent decisions, the Circuit Court has conceptually grouped those in the custody of the NCCC or NYCDOC (who have perforce been seen both by a prosecutor and Judge) with those cases where a police officer has erroneously decided that a strip-search incident to an arrest was warranted. *See, Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271 n. 7 (7th Cir. 1983) (strip or body cavity searches incident to arrest are only constitutional where there is a reasonable belief that arrestee is concealing contraband); *cf. Swain v. Spinney*, 117 F.3d 1, 5 (1st Cir. 1997) (strip and visual body cavity search must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons); *Kaufman v. Rivera*, 173 F.3d 844 (2d Cir. 1999) (arresting officer cannot perform a strip search of an arrestee charged with a misdemeanor offense "unless the [official has] a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.")

Arrestee cases such as *Mary Beth G.* are categorically different than those where someone is about to be introduced into the general population of a potentially large and complex correctional setting. The Circuit Court has essentially undone the thirty years of this Court's jurisprudence since *Bell v. Wolfish* where the privacy expectation of inmates was found to be significantly different than those of people walking freely in civil society — and certainly different than mere arrestees. Holding corrections personnel to such a standard not only runs counter to that level of inmate privacy previously found appropriate by this Court, but also endangers

the inmates who are the intended recipients of the protections afforded by searching new admittees to jail and prison systems.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

RICHARD J. KOEHLER
MARC ALAIN STEIER
KOEHLER & ISAACS, LLP
Attorneys for Amicus Curiae
Correction Officers' Benevolent Association
120 Broadway — 29th Floor
New York, New York 10271
(917) 551-1300

(5)

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No. 02-541

In the
Supreme Court of the United States

NASSAU COUNTY, ET AL.,
Petitioners,

v.

RAY E. SHAIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT L. HERBST
Counsel of Record
SPENCER B. FREEDMAN
BELDOCK, LEVINE AND
HOFFMAN, LLP
99 PARK AVENUE
NEW YORK, NY 10016
(212) 490-0400

Counsel for Respondent
Ray E. Shain

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondent, Ray E. Shain, states that he has no corporate affiliations.

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COUNTERSTATEMENT OF THE CASE

The salient facts are set forth in the Second Circuit's opinion below. (A. 11-30).[1]

On July 30, 1995, Shain, a practicing attorney, was admitted to the Nassau County Correctional Center ["NCCC" or "Jail"] and strip searched pursuant to a blanket policy that required any person admitted to the Jail to be subjected to a strip search and visual body cavity inspection as a matter of course. (R. 595). Shain was required to strip naked. (R. 596-99). Corrections Officer Dantunono looked in Shain's ears, his mouth, his hair, and his underarms, and then made him turn around, bend over and spread his buttocks apart with his hands to facilitate a visual inspection of his rectum. (R. 596-99; 761). The strip search procedure also included an inspection of Shain's frontal genitalia - the penis, the scrotum, and the testicles - which he was required to lift up. (R. 764; 792-93).

Shain's strip search was performed in a large room, without privacy, in the sight of other corrections officers and prisoners. (R. 608). Shain was to be held at the Jail overnight only, to be produced in Family Court the next morning. Prior to leaving the Jail, Shain was subjected to another strip search and visual body cavity inspection. Because the NCCC's health quarantine policy required new admittees to be isolated from the general jail population for 72 hours after admission, Shain was never admitted to the

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[1] "A." is a reference to the Appendix annexed to the Petition for a Writ of Certiorari. "R." is a reference to the record citation in the Appendix filed in the Second Circuit.

general jail population. Upon his appearance in Family Court, he was released from custody.

At the time he was strip-searched, no grounds existed to suspect that Shain was concealing weapons or contraband, let alone concealing them under his garments. After reviewing Shain's jail file, Lt. Considine acknowledged that there was no "particularized suspicion that Mr. Shain had contraband on him." (R. 806). Petitioners knew only that Shain was a civil detainee being held overnight, to be produced in Family Court the following morning. The verbal harassment family offense for which he had been arrested and detained was not a crime of violence or one involving drugs, weapons or other contraband. (R. 102-03). Shain had never previously been arrested. When he was arrested here, his pockets were emptied and a small combination pocketknife (also containing a bottle opener and screwdriver) was removed and left at his house. (R. 542 ¶ 5, 585). The pocketknife, however, was not considered to be a weapon, and its presence was neither recorded in police paperwork nor communicated to Jail officials. (R. 103). Shain did not physically resist arrest. (R. 583-85).

From the point of his arrest until his arrival at the Jail where he was strip-searched, Shain was never out of the custody of law enforcement officers, even at the hospital to which he had been transported for evaluation and treatment of back spasms. Although Shain was in a holding cell with other arrestees for some time before his court appearance, correctional procedure at the courthouse insured that Shain and his cellmates were all thoroughly patted down and searched prior to entry into the cell. Indeed, for almost all of the 27 hours he was in custody prior to being strip searched, Shain was in handcuffs in a cell at the precinct, the hospital or the courthouse. He had no contact visits with anyone.

In short, the strip and body cavity search to which Shain was subjected was entirely unsupported by reasonable suspicion.

REASONS FOR DENYING THE WRIT

Two reasons for denying the writ stand out among many: First, in cases concerning blanket policies mandating strip searches of all non-felony arrestees upon admission to Jail facilities, there is no conflict among the circuits. Every circuit court to have considered the matter has ruled such blanket policies unconstitutional, requiring reasonable suspicion to support such strip searches. Significantly, petitioners do not cite any strip search cases to support their suggestion of a conflict among the Circuits.

Second, in the 16 years since the Second Circuit first held that strip searches of persons arrested on misdemeanor and petty offense charges must be justified by particularized reasonable suspicion of concealed weapons or contraband, petitioners and other jail administrators have failed to demonstrate to any federal appellate court that blanket strip searches of all admittees are necessary to provide security at their institutions, particularly today, when magnetometers, B.O.S.S. chairs, and other less intrusive means are easily available. The record in the case at bar is no exception, for it demonstrates how non-essential strip searching has been in providing security at the NCCC.

A. There is no Circuit Conflict in the Strip Search Context

The Fourth Amendment prohibits "unreasonable" searches and seizures. In *Bell v. Wolfish,* 441 U.S. 520 (1979), this Court ruled that Fourth Amendment

reasonableness analysis "requires a balancing of the need for a particular search against the invasion of personal rights that the search entails." Reasonableness turns on (1) the scope of the particular intrusion, (2) the manner in which the search is conducted, (3) the justification for initiating the search and (4) the place in which the search is conducted. 441 U.S. at 559.

In 1986, the Second Circuit applied *Bell* to hold that a strip search of a misdemeanor arrestee is unlawful unless there is "reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest." *Weber v. Dell,* 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied sub nom County of Monroe v. Weber,* 483 U.S. 1020 (1987). As the Second Circuit noted below, "[w]e also rejected defendant's request for qualified immunity [in *Weber*] because all the circuits that had addressed similar policies had found them to be unconstitutional and because we long had stressed the intrusive nature of body cavity searches. *See* 804 F.2d at 803." (A. 18).

Sixteen years later, and 15 years after *Turner v. Safley,* 482 U.S. 78 (1987), on which petitioners so heavily rely here, that same observation remains true. "For more than two decades, courts have specifically and repeatedly recognized the importance of guarding against unreasonable strip searches, in view of the degrading nature of this particular invasion of privacy." *Sarnicola v. County of Westchester,* 2002 WL 31408882, *9 (S.D.N.Y. October 23, 2002). The Second Circuit's decision below is simply one in a long and unanimous line of cases that, relying on *Bell*, have struck down blanket strip search policies like that here, both before and after *Turner*. *See, e.g., Wilson v. Jones,* 251 F.3d 1340 (11th Cir. 2001); *Roberts v. Rhode Island,* 239 F.3d 107

(1st Cir. 2001); *Chapman v. Nichols,* 989 F.2d 393 (10th Cir. 1993); *Masters v. Crouch,* 872 F.2d 1248 (6th Cir.), *cert denied,* 493 U.S. 977 (1989); *Ward v. County of San Diego,* 791 F.2d 1329 (9th Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987); *Jones v. Edwards,* 770 F.2d 739 (8th Cir. 1985); *Stewart v. Lubbock County,* 767 F.2d 153 (5th Cir. 1985), *cert. denied,* 475 U.S. 1066 (1986); *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983); *Logan v. Shealy,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982).

"Every circuit court" which has considered strip searches of plaintiffs arrested for minor violations who were strip searched solely because a blanket policy required such searches of all detainees "has concluded that a search under these circumstances is unconstitutional." *Chapman,* 989 F.2d at 395 (*citations omitted).*[2] "[N]o published state or federal case since *Schmerber v. California,* 384 U.S. 757 (1966) (test of reasonableness under fourth amendment requires a balancing of the need for particular search against the invasion of personal rights the search entails) upholds the constitutionality of a blanket policy of strip searches of minor offense arrestees." *Ward,* 791 F.2d at 1332; *see also Wilson,* 251 F.3d at 1343-44 (citing cases).

This judicial consensus for more than 30 years is based on several fundamental principles. The first and most important is the widely-shared perception that visual body cavity searches are different from other searches. They

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[2] In related contexts, reasonable suspicion is required before correctional facilities may strip search prison visitors or corrections officers. *See, e.g., Varrone v. Bilotti,* 123 F.3d 75 (2d Cir. 1997) (visitors); *Security and Law Enforcement Employees v. Carey,* 737 F.2d 187 (2d Cir. 1984) (corrections officers).

impinge much more seriously upon Fourth Amendment values because they are a "severe if not gross interference with a person's privacy." *Roberts*, 239 F.3d at 110. They are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G.*, 723 F.2d at 1272. "The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event." *Chapman,* 989 F.2d at 396.

Second, those arrested and detained for misdemeanor and violation level offenses are not only less likely to be dangerous but, like those arrested for offenses having nothing to do with physical violence, weapons or drugs, are less likely to be concealing weapons or contraband under their clothing. *Roberts,* 239 F.3d at 111-12. Because of the "essentially unplanned nature of an arrest and subsequent incarceration," it is "far less likely that smuggling of contraband will occur subsequent to an arrest (when the detainee is normally in handcuffed custody) than during a contact visit that may have been arranged solely for the purpose of introducing contraband[.]" *Roberts,* 239 F.3d at 111.

Third, because of technological advances like magnetometers and other devices, corrections officials are now expected to "be able to detect contraband on the person of a detainee without the need for a body cavity inspection." *Roberts,* 239 F.3d at 111. Indeed, in all the years since *Weber,* no prison administrator has been able to demonstrate in any reported case of which Respondent is aware that

blanket strip searching upon admission to a municipal or county jail facility was either necessary or effective in preventing contraband from being introduced to such facilities. *See, e.g., Roberts,* 239 F.3d at 112 ("close examination of [the] record indicates that a body cavity search was (with one possible exception) entirely unnecessary to discover contraband found during search").

The record below also demonstrates how ineffective and unnecessary blanket strip searches and body cavity inspections have been to the maintenance of security at the NCCC. Only one officer per shift strip-searched all new inmates upon their admission to the Jail. In the two years that Corrections Officer Dantunono conducted these strip searches, he never found any weapons or contraband, and he never heard of any weapons or contraband recovered as a result of such strip-searching by any other corrections officers at the Jail. (R. 769; 773-74). Lt. Considine, the supervisor who would receive all reports of weapons or contraband found in a strip search, could not recall one instance in the year before he testified of receiving a report of contraband discovered in a strip search of any person newly-admitted to the Jail. (R. 799-800).

In response to Shain's request for NCCC documentation on strip searches that had turned up weapons or contraband from 1993 to 1998 -- a period during which there were approximately 75,000 strip searches of new admissions (R. 795-96) -- petitioners provided documents on only 16 strip searches conducted on new detainees admitted to the NCCC (R. 343-493; SA7-43).[3] Only three of those searches yielded weapons or contraband from the admittee's

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[3] "SA" refers to the Supplemental Appendix in the Second Circuit.

body or body cavity, and in those three cases there was a drug or felony history that might have justified a strip search based on reasonable suspicion. (R. 354-72, R 391-97, R. 398-413). In the other 13 searches, the contraband was found in or on the shoes or outer clothing, and could therefore have been found by a "pat down" or "clothing" search only. (R. 343-493). In other words, petitioners could not point to even one case where a strip search performed without colorable reasonable suspicion was required to uncover a weapon or other contraband from a body or body cavity. There was also no overcrowding at the NCCC when Shain was strip searched in 1995, and for many years prior thereto. (R. 724-25).

Thus, this record is utterly devoid of any factual support for petitioners' incendiary assertion that the decision below "undermines the safety of corrections officers and inmates" of this or any other county jail or correctional facility. (Petition, at 2). Nor is there one iota of support for the proposition that "strip searches remain the most effective method for detecting contraband," or "are an indispensable tool for maintaining a secure prison environment." (Petition, at 16).

Accordingly, while the need to assure jail security is "a legitimate and substantial concern," blanket strip search policies bear "an insubstantial relationship to security needs so that, when balanced against" the intrusion of privacy interests that strip searches necessarily entail, such searches of non-felony arrestees and detainees upon admission to jail facilities, conducted without reasonable suspicion, "cannot be considered 'reasonable'" under *Bell's* balancing test. *Chapman*, 989 F.2d at 396, *quoting Mary Beth G.*, 723 F.2d at 1273; *see also Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), *overruled on other grounds*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (jail security needs

do not justify strip search absent reasonable suspicion that individual detainee is carrying weapons or contraband); *Logan,* 660 F.2d at 1013 ("An indiscriminate strip search policy routinely applied to detainees such as Logan along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations.").

No Circuit has suggested otherwise, either before or after *Turner.* There is thus no Circuit conflict, no reason to disturb these settled principles of law, and no reason to grant the writ.

B. There is no Conflict between *Turner* and *Bell* and its Strip Search Circuit Progeny

Petitioners did not even cite *Turner* in the district court or the Second Circuit. Here, however, they suggest that *Turner* rather than *Bell* applies, requires reversal, and creates a Circuit conflict which requires this Court's intervention.

But *Turner* is not in conflict with *Bell*, nor with *Weber* and the other Circuit Court cases applying *Bell* in the blanket strip search policy context. Rather, *Turner* re-affirmed that *Bell* and three other decisions of this Court[4] do not require prison regulations to meet a heightened scrutiny standard, but only that such regulations be reasonably related to legitimate penological interests that must be balanced against the burden

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[4] *Block v. Rutherford*, 468 U.S. 576 (1984); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974).

placed by such regulations on constitutional rights. 482 U.S. at 86-88.

This Court in *Turner* "identified several factors that are relevant to, and that serve to channel the reasonableness inquiry," *Thornburgh v. Abbott,* 490 U.S. 401, 414 (1989), including whether there is a valid, rational connection between the regulation and a legitimate governmental interest purportedly justifying it, and whether there are readily available alternatives to the regulation and to exercise of the constitutional right involved. 482 U.S. at 89-91. These *Turner* factors have generally been applied in balancing prison regulations against the constitutional rights of convicted prisoners in state prisons rather than of pretrial detainees in municipal and county jails, and in cases involving regulations which impinge upon "affirmative" constitutional rights such as the right *to* free exercise of religion or the right of access to publications under the First Amendment, rather than upon the Fourth Amendment's right to be free *from* unreasonable searches. *See, e.g., Thornburgh* (First Amendment challenge to prison regulation restricting access to publications); *O'Lone v. Shabazz,* 482 U.S. 342 (1987) (First Amendment challenge to prison work regulations which prevented attendance at religious services); *Turner* (First Amendment challenge to ban on inmate-to-inmate correspondence).

The cases cited by petitioners to suggest a Circuit conflict are all First Amendment cases and are therefore distinguishable from the Fourth Amendment strip search context in which *Bell, Weber* and *Shain* constitute links in an unbroken chain of settled strip search jurisprudence. See Petition, at 11-12, citing *Siddiqi v. Leak*, 880 F.2d 904 (7th Cir. 1989) (First Amendment challenge to policy that infringed on Muslim inmates' access to Jumu'ah services); *Friend v. Kolodzieczak*, 923 F.2d 126 (9th Cir. 1990) (First

Amendment challenge to policy prohibiting inmates from possessing rosaries and scapulars in their cells); *Mauro v. Arapaio,* 188 F.3d 1054, 1058-62 (9th Cir. 1999) (*en banc*), *cert. denied,* 529 U.S. 1018 (2000) (First Amendment challenge to policy denying inmates access to sexually explicit publications); and *Hause v. Vaught,* 993 F.2d 1079, 1083 (4th Cir. 1993), *cert. denied,* 510 U.S. 1049 (1994) (First Amendment challenge to policy prohibiting receipt of outside publications by mail; court noted that both *Turner* and *Bell* accorded the same standard of deference to prison administrative policies).

No case in this Court has intimated that *Turner* overruled or undercut either *Bell,* which fashioned a reasonableness balancing test for the specific Fourth Amendment context with which it was concerned, or the unanimous line of Circuit cases discussed above predicated on *Bell* and ruling unconstitutional blanket strip search policies like that here. Indeed, less than one month after *Turner* was decided, this Court denied certiorari on the same day in two such cases, *Weber* and *Ward*, without mentioning *Turner* or suggesting that it overruled or undercut either those cases or *Bell*. Indeed, in the 15 years since *Turner*, virtually all of the strip search cases in the Circuits have relied exclusively on *Bell* and its balancing test and have not even mentioned *Turner*.

In the few cases in which *Turner* has been cited in the strip search context, it has been to reiterate the standard of review set forth in *Bell* and, in some cases, to complement the court's application of the *Bell* balancing test where the court has also found certain *Turner* factors to be useful. *See, e.g., Covino v. Partissi,* 967 F.2d 73, 77-78 (2d Cir. 1992) ("court must balance the intrusiveness of the search on the individual's fourth amendment interests against its promotion

of legitimate governmental interests," citing both *Bell* and *Turner*); *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1445-46 n. 4 (9th Cir. 1989) (standard set forth in *Turner* does not prohibit application of the *Bell* test in the Fourth Amendment context).

These cases only highlight how complementary, rather than inconsistent, the standards and tests articulated in *Turner* are to *Bell* and *Bell's* strip search Circuit progeny. Rather than being in "direct conflict" as petitioners suggest (Petition, at 13-16), all of these cases, including the Circuit cases holding blanket strip search policies unconstitutional, reject application of a heightened standard of review, and "recognize[ ] the judiciary's limited institutional competence in the field of prison administration ... [w]ithout abandoning the judicial duty to safeguard individual rights." (Petition, at 13). All employ a balancing test which, based on similar principles of limited judicial review, balances the burden placed on constitutional rights against security concerns or other legitimate interests of the administrators of prisons and jails. *Bell*'s formulation of the balancing test is simply designed more specifically to take into account the pertinent considerations in Fourth Amendment challenges to strip search policies in correctional facilities and continues to provide the most useful framework in such cases, as is evident by its unanimous employment by appellate courts in this context post-*Turner*. *See, e.g., Wilson v. Jones*, *supra*; *Roberts v. Rhode Island*, *supra*; *Chapman v. Nichols*, *supra*; *Masters v. Crouch*, *supra*.

Finally, application of the specific *Turner* factors would not help petitioners here. Their blanket strip search policy would fail that test as it does the related but more specific *Bell* test. On this record, there is not one shred of evidence that indiscriminate strip searching is either necessary

or even effective in preventing the introduction of weapons or contraband to the facility. Petitioners cannot point to one strip search during all the years they maintained their unlawful blanket policy that actually ferreted out weapons or contraband on an admittee's body or in one of his or her bodily orifices in circumstances where reasonable suspicion was absent. Petitioners have therefore failed to demonstrate a valid, rational connection between their blanket strip search policy and the security interest that they purport to advance to justify it. 482 U.S. at 89-90.

There is also no explanation at all of why readily available alternatives such as magnetometers, B.O.S.S. chairs, careful "pat down" and "clothing" searches would not provide adequate security, particularly when all admittees to Jail are isolated from the general population for the first 72 hours of their admission. The ready availability of such alternatives is evidence under *Turner* that the blanket strip search policy is unreasonable. *Id.* at 90-91.

Moreover here, there are no alternative means of protecting admittees' privacy rights – once they are subjected to a strip and visual body cavity search, they have irrevocably lost their Fourth Amendment rights, and have been subjected to the most degrading and extreme invasion of those rights, which our settled strip search jurisprudence teaches merits protection against unreasonable intrusion. *Id.* at 90.

In short, the outcome would be the same because *Turner* is fundamentally compatible rather than inconsistent with *Bell*, *Weber* and the other Circuit cases which, relying on *Bell,* have consistently held blanket strip search jail policies as applied to non-felony admittees unconstitutional. There is no conflict, either in the caselaw or among the Circuits, and

nothing in this record or the decision of the court below, which warrants this Court's intervention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

ROBERT L. HERBST
Counsel of Record
Beldock, Levine and Hoffman, LLP
99 Park Avenue
New York, New York 10016
(212) 490-0400

SPENCER B. FREEDMAN
of Counsel.

Attorneys for Respondent

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No. 02-541

In the
Supreme Court of the United States

THE COUNTY OF NASSAU and JOSEPH JABLONSKY,

Petitioners,

vs.

RAY E. SHAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CORRECTION CAPTAINS' ASSOCIATION OF THE CITY OF NEW YORK IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FRANKIE & GENTILE, P.C.
Attorneys for Amicus Curiae
Correction Captains' Association of the City of New York
1565 Franklin Avenue, Suite 105
Mineola, New York 11501
(516) 742-6590

JAMES G. FRANKIE,
of Counsel.

November 1, 2002

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioners have consented to the filing of this *Amicus Curiae* brief in support of the Petition. A copy of their consent letter dated September 19, 2002 has been forwarded with the brief. The consent of the Respondent was requested, but not granted.

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INTERESTS OF *AMICUS CURIAE*

The Correction Captains' Association of the City of New York, hereinafter referred to as ("CCA") respectfully submits this brief in support of the Petition for Certiorari in this matter.[1]

The CCA is the certified collective bargaining unit for supervisors in the rank of Captain in the New York City Department of Correction. There are approximately nine hundred fifty (950) members in the CCA.

The New York City Department of Correction, hereinafter (DOC), provides for the care, custody and control of inmates housed in its facilities. The vast majority of these inmates are detainees awaiting disposition of criminal charges in the Courts of the five counties of New York City *i.e.*, Kings, Bronx, Richmond, New York and Queens. However, DOC also houses inmates sentenced to terms of incarceration of one year or less. Additionally, the DOC houses inmates pursuant to contract with the State of New York and houses inmates awaiting transport to other jurisdictions both State and Federal for resolution of their cases in those jurisdictions.

Correction Captains as first line supervisors are responsible for insuring the proper care, custody and control of all inmates housed in DOC facilities. In addition to insuring the safety of all inmates, Captains (CCA) are also responsible for the safety of visitors and staff. CCA members are sued and/or disciplined under a failure to supervise theory when inmates injure visitors, staff, each other or themselves.

Modification of the Department's policy to prohibit the strip search of new admissions charged with misdemeanors

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[1] Pursuant to Rule 37.6 of this Court, the *amicus curiae* represents that counsel for *amicus* authored this brief in its entirety and that no person or entity other than the *amicus* and its representatives made any monetary contribution to the preparation or submission of this brief.

absent reasonable suspicion that the inmate is carrying contraband, (*e.g.*, weapons or drugs), inhibits the safe, prudent and effective administration of Department facilities and exposes inmates, visitors and staff to unnecessary, real and heightened dangers. Moreover, CCA members will be subject to discipline and potential civil liability. Often, said liability will be premised upon a failure to detect and/or prevent the possession of contraband by inmates.

Therefore, the CCA urges this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit which struck down the policy of the Nassau County Correctional Center which provided for routine strip searching of all new admission inmates as a violation of the Fourth Amendment unless the correctional center could articulate reasonable suspicion that the inmate was concealing contraband (*e.g.*, weapons or drugs).

SUMMARY OF THE ARGUMENT

The practice of strip searching new admission inmates, who have been remanded to the custody of the Department of Correction, serves a legitimate governmental security concern. The policy constitutes an effective and necessary method of detecting and deterring the introduction of contraband into correctional facilities. It is a reasonable and rational practice which is presented in a correctional setting and is constitutional under the circumstances.

Any requirement that reasonable suspicion be established before new admission inmates charged with non-felony offenses could be strip searched upon their remand to custody unnecessarily interferes in the proper and efficient operation of the correctional facility. Such a requirement undermines the safety and security of the facility and exposes staff, visitors and inmates to unjustifiable dangers. Moreover, any claimed justification for distinguishing between felony and non-felony new admissions inmates as it relates to their

strip search upon entry into the correctional facility is unsound and not warranted by the Constitution. Additionally, an attempt to distinguish between "prisons" and "jails", especially in an urban setting such as New York is artificial, untenable and fails to recognize the realities of an urban correctional setting.

Deference to the expertise of correctional authorities in providing for the safety and security of staff, visitors and inmates should be given. The policy of strip searching all new admissions inmates represents a legitimate penalogical interest and is Constitutionally sound.

ARGUMENT

POINT I

THE STRIP SEARCH OF NEW ADMISSION INMATES UPON THEIR ENTRY INTO THE CORRECTIONAL FACILITY IS NECESSARY TO MAINTAIN THE SAFETY AND SECURITY OF THE FACILITY AND IS CONSTITUTIONAL

Simply because prison inmates retain certain constitutional rights does not preclude these rights from being subject to reduction and diminution. Lawful incarceration brings limitations of rights and privileges justified under our penal system, *Bell v. Wolfish*, 421 U.S. 520, 546 (1979) *Price v. Johnson*, 334 U.S. 266, 285 (1948).

These constitutional limitations are justified by considerations and circumstances underlying the legitimate policies of the correctional facility. And, while Courts might disagree with certain aspects of the operation of the correctional facility, a Court should not substitute its judgment for that of the administration experts under whose care, custody and control these inmates have been lawfully committed, *Bell v. Wolfish, supra, Price v. Johnson, supra, Pell v. Procunier*, 417 U.S. 817, 822 (1974).

Plaintiff herein was arrested by Nassau County Police and charged with Harassment in the first degree, a Class B misdemeanor.[2] The police had been called by plaintiff's wife to the couple's residence pursuant to a domestic violence call. Plaintiff was arrested and held overnight at Nassau County Police Headquarters. The following morning plaintiff was transported to the Nassau County Family Court where he was arraigned on the family offense petition filed by his wife and was remanded to the Nassau County Correctional Center (NCCC). Upon his arrival and admission to the NCCC, plaintiff was required to submit to a visual strip search which included the removal of all of his clothing, the looking into his ears, mouth, hair, his lifting of his arms, and genitalia as well as his bending over and spreading his buttocks to facilitate visual inspection of his rectum for contraband.

Plaintiff challenges the NCCC policy of visual strip search of all new admissions arguing that prisoners charged with non-felony offenses are immune from such searches upon their admission to the NCCC absent reasonable suspicion that they are secreting contraband in the form of weapons or drugs.

The United States District Court and the Court of Appeals, Second Circuit agreed with plaintiff relying on the holdings in *Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988) and *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986). The CCA respectfully submits that the Courts' reliance upon these cases in reaching the decision herein was misplaced.

Walsh and *Weber*, involved unfortunate facts and circumstances, but involve scenarios which have no application to

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[2] New York State Penal Law Section 70.15(2) provides that the sentence for a Class B misdemeanor shall not exceed three months. The sentence for Class A misdemeanors shall not exceed one year. The sentence for unclassified misdemeanors shall be in accordance with the term fixed by that specific statute. See Penal Law Section 70.15(1) and Section 70.15(3).

the instant matter. In *Weber v. Dell, supra,* the defendant's son was the victim of a crime (criminal mischief damage to his automobile). Family and friends were gathered at the defendant's home for a party following a wedding reception. The police were called and requested to respond to the residence in order that a report could be filed. After a protracted period of time, the police had yet to appear at the defendant's residence. The defendant called again complaining about the lack of police response. In the conversation defendant was told that the police would only respond immediately if there was a shooting. Defendant responded that there was a shooting and demanded an immediate police response. The police responded and arrested defendant for calling in a false police report, *i.e.*, that there had been a shooting. Defendant was arrested, handcuffed and removed from her residence by police in the presence of the wedding guests. The defendant was taken to the County jail where she was strip searched and thereafter released to appear for arraignment at a later date.

In *Walsh v. Franco, supra,* the defendant was challenging the legality of several parking tickets he had received. Through a mailing and clerical error, the incorrect court date was mailed to the defendant. The defendant, through no fault on his part, did not appear in court to answer the parking tickets and a warrant was issued for his arrest. The defendant was arrested and strip searched upon his admission to the County jail. Defendant was forced to undergo the strip search admissions procedure even though bail had already been posted on his behalf. Upon completion of the admissions process defendant was released on the $100 station house bail that had already been posted.

Both *Weber* and *Walsh* involved arrestees held in pre-arraignment detention. There had been no judicial determination concerning the issue of probable cause. Moreover, the defendants in *Weber* and *Walsh* were released after the police

processing stage and directed to return to Court at a later date. By contrast, the plaintiff in the instant matter was arraigned in Court and was remanded to the custody of the Nassau County Sheriff's Department at the Nassau County Correctional Center. Unlike *Weber* and *Walsh* who were strip searched at the police processing stage; the strip search of Shain, the plaintiff herein, was conducted after his arraignment in Court, remand to the Nassau County Correctional Center and upon his admission to the general jail population. See, *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1448 (9th Cir., 1990); *Dobrowolskyj v. Jefferson Co.*, 823 F.2d 955, 958 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1262, 1272 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981).

The Court of Appeals declined to follow this Court's holding in *Turner v. Safley*, 482 U.S. 78 (1987) which deferred to the expertise of correctional authorities in the day to day management of correctional facilities. In declining to apply *Turner*, the Court of Appeals created an unworkable distinction between "jails" and "prisons". The realities of the urban correctional facility (jail) including but not limited to the volume, contractual agreements to house State sentenced prisoners and the detaining of prisoners for other State and Federal authorities renders such a distinction untenable.

This Court in *Block v. Rutherford*, 468 U.S. 576 (1984) noted that the failure of a defendant to obtain release on bail or personal recognizance was a significant factor bearing on security measures needed for the proper administration of a detention facility. When one considers the Court's recognition of the relative ease with which one can obtain release on bail or personal recognizance pending trial it is submitted that the failure of a defendant charged with a non-felony to obtain release should signal that there may have been factors considered by the arraignment court that

render this individual a greater security risk rather than a lesser one as argued by the plaintiff herein.

In addition to distinguishing the case at bar from the plaintiffs in ***Walsh*** and ***Weber*** due to their pre-arraignment detention status, it is respectfully submitted that the Court erred in not giving appropriate deference to correctional administrators in determining what is needed to maintain internal discipline and security.

This Court has upheld the strip search, including body cavity search of detainees after contact visits with visitors from outside the facility. This Court noted that "simply because prison inmates retain certain constitutional rights does not mean their rights are not subject to reduction and diminution. Lawful incarceration brings limitations of rights and privileges justified under our penal system" ***Bell v. Wolfish***, at 546. Additionally, a ban on contact visits was determined to be constitutionally permissible and deference to jail administrators was afforded in determining such a policy to be needed and justified. ***Block v. Rutherford***, ***supra***.

In the case at bar, there are legitimate concerns that a policy of permitting inmates charged with non-felony offenses to enter the prison population without being "visually strip searched" will lead to an increase in contraband in the form of weapons and illegal drugs being introduced into the facility and imperil the safety and security of the facility, staff, visitors and inmates.

A policy of strip searching all new admissions is not only an effective method of detecting and confiscating contraband; it is a deterrent. The fact that the number of inmates caught attempting to smuggle contraband into the facility has declined is a testament that a no exception policy concerning search of all new admissions is a strong deterrent.

The requirement that reasonable suspicion exist before new admission inmates charged with non-felony offenses

may be strip searched upon their entry into the prison population is not required by the Constitution.

The Fourth Amendment to the United States Constitution, guarantees the right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV. This Court had held the blanket body cavity search of all inmates after contact with outside visitors to be a reasonable exercise of prison officials authority in determining how to provide the safety and security of their institutions, *Bell v. Wolfish, supra.*

Inmates held after arraignment in the New York City System and in Nassau County, the case at bar, are not segregated by offense charged when transported to the correctional facility. Those charged with felonies and those charged with lesser offenses are transported together. Concern that those charged with non-felony offenses who will not be subject to strip search as a matter of policy will be utilized to smuggle contraband for themselves and others is real. The existence of a "pecking order" among the inmate population is well established. Predatory inmates may coerce or threaten the weaker members of the inmate population who are charged with misdemeanors into serving as "mules" to smuggle contraband into a correctional facility. These inmates may do so for a myriad reason including that they are threatened, promised protection, promised payment of money or promised the posting of bail.

Finally, it merits noting that in New York City as well as in the case at bar (Nassau County), some inmates are held on misdemeanor charges only to have warrants and/or new arrests on more serious charges, felonies and violent felonies lodged after their admission to the facility for conduct that occurred prior thereto. The reality that these inmates will have entered as misdemeanor new admissions immune from the visual strip search policy is further evidence of the need that all new admissions be visually strip searched upon their entry into the correctional facility and that the distinction

between felony and non-felony inmates with respect to the strip search policy is not practical.

Accordingly, the decision of the Court below should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANKIE & GENTILE, P.C.
Attorneys for Amicus Curiae
Correction Captains' Association of the City of New York
1565 Franklin Avenue, Suite 105
Mineola, New York 11501
(516) 742-6590

JAMES G. FRANKIE,
of Counsel.